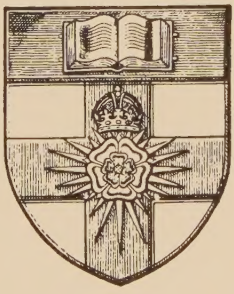
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Nx. North Gallery.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-common-pleas_1876-1877_2

Edward Bourne
Lucknow
1878

THE

# INCORPORATED COUNCIL OF LAW REPORTING

FOR

# ENGLAND AND WALES.

## Members of the Council.

*Chairman*—JOSEPH BROWN, Esq., Q.C.

### *EX-OFFICIO MEMBERS.*

| | |
|---|---|
| SIR JOHN HOLKER, Knt., M.P. . . | ATTORNEY-GENERAL. |
| SIR HARDINGE S. GIFFARD, Knt., M.P. . | SOLICITOR-GENERAL. |

### *ELECTED MEMBERS.*

| | |
|---|---|
| MR. SERJEANT SIMON, M.P.<br>MR. SERJEANT PULLING | Serjeants' Inn. |
| W. B. GLASSE, ESQ., Q.C.<br>JOHN PEARSON, Esq., Q.C. | Lincoln's Inn. |
| SIR JAMES FITZJAMES STEPHEN, Knt., Q.C.<br>JOHN BLOSSETT MAULE, Esq., Q.C. | Inner Temple. |
| JOSEPH BROWN, Esq., Q.C.<br>ALFRED WILLS, Esq., Q.C. | Middle Temple. |
| JOHN A. RUSSELL, Esq., Q.C.<br>WILLIAM CRACROFT FOOKS, Esq., Q.C. | Gray's Inn. |
| WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields<br>W. S. COOKSON, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn | Incorporated Law Society. |

*Secretary*—JAMES THOMAS HOPWOOD, Esq., 10, Old Square, Lincoln's Inn.

THE

# LAW REPORTS.

## Common Pleas Division.

REPORTED BY

JOHN SCOTT, EDMUND LUMLEY, AND
JOHN EDWARD HALL, BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

CHARLES MARETT, WILLIAM MILLS, AND
HENRY HOLROYD, BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. II.

FROM MICHAELMAS SITTINGS, 1876, TO TRINITY SITTINGS, 1877,
BOTH INCLUSIVE.

XL VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1877.

BIBL. LONDIN UNIV.

# JUDGES

OF

# THE COMMON PLEAS DIVISION

OF

## THE HIGH COURT OF JUSTICE.

XL VICTORIA.

---

The Right Hon. Lord Coleridge, Lord Chief Justice, President.
Sir William Robert Grove, Knt.
The Hon. George Denman.
Sir Nathaniel Lindley, Knt.
Sir Henry C. Lopes, Knt.

ATTORNEY GENERAL.

Sir John Holker, Knt.

SOLICITOR GENERAL.

Sir Hardinge Stanley Giffard, Knt.

# JUDGES

OF

# THE COURT OF APPEAL.

XL VICTORIA.

---

Lord Cairns, Lord Chancellor.

Sir Alexander James Edmund Cockburn, Bart., Lord Chief Justice of England.

Sir George Jessel, Master of the Rolls.

Lord Coleridge, Lord Chief Justice of the Common Pleas.

Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer.

Sir William Milbourne James,
Sir George Mellish,
Sir Richard Baggallay,
Sir George Wilshere Bramwell,
Sir William Baliol Brett,
Sir Richard Paul Amphlett,
Sir Henry Cotton,

} Ordinary Judges of Court of Appeal.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. | 1 Ex. D.
1 C. P. D. | 1 P. D.

In the Third Series,
1 App. Cas.

# TABLE OF CASES REPORTED

## IN THIS VOLUME.


A.

| | | PAGE |
|---|---|---|
| Allkins *v.* Jupe | | 375 |
| Arnott, Casey *v.* | | 24 |

B.

| | | PAGE |
|---|---|---|
| Banque Franco-Egyptienne, Grant *v.* | (C. A.) | 430 |
| Barber *v.* Callow | | 558 |
| Basingstoke, Mayor of, Soper *v.* | | 440 |
| Beazley, Norris *v.* | | 80 |
| Bennett, Coggins *v.* | | 568 |
| Bessela *v.* Stern | (C. A.) | 265 |
| Bisshopp, Tunbridge Wells Local Board *v.* | | 187 |
| Blackwell, Charles *v.* | (C. A.) | 151 |
| Brantom *v.* Griffits | (C. A.) | 212 |
| Breslauer, Wilson *v.* | (C. A.) | 314 |
| Burchell *v.* Clark | (C. A.) | 88 |
| Burrows, Keith *v.* | (C. A.) | 163 |

C.

| | | PAGE |
|---|---|---|
| Cadby, Gay *v.* | | 391 |
| Caldow *v.* Pixell | | 562 |
| Callander *v.* Hawkins | | 592 |
| Callow, Barber *v.* | | 558 |
| Carter, Harrison *v.* | | 26 |
| Casey *v.* Arnott | | 24 |
| Catlow *v.* Catlow | | 362 |
| Cave, Chatterton *v.* | (C. A.) | 42 |
| Charles *v.* Blackwell | (C. A.) | 151 |
| Chatterton *v.* Cave | (C. A.) | 42 |
| Chillingworth, Mackley *v.* | | 273 |
| Clark, Burchell *v.* | (C. A.) | 88 |
| Coggins *v.* Bennett | | 568 |
| Cook *v.* Ward | (C. A.) | 255 |
| Cousins, Humphries *v.* | | 239 |
| Cox, Pearson *v.* | (C. A.) | 369 |
| Credit Lyonnais, Johnson *v.* | | 224 |
| Creen *v.* Wright | (C. A.) | 354 |
| Crew *v.* Terry | | 403 |
| Crom *v.* Samuels | | 21 |
| Croydon Gas Company *v.* Dickinson | (C. A.) | 46 |

D.

| | | PAGE |
|---|---|---|
| Daniel *v.* Janes | | 351 |
| Dawson *v.* Robins | | 38 |

PAGE

Dickinson, Croydon Gas Company *v.* (C. A.) 46
Dickson *v.* Reuter's Telegraph Company 62

E.

Ellis *v.* Manchester Carriage Company 13
Elmit, Richardson *v.* 9
Evans *v.* Mostyn 547
Eyre *v.* Smith (C. A.) 435

F.

France, White *v.* 308
Franconia, Owners of, Harris *v.* 173
Frederici *v.* Vanderzee (C. A.) 70
French *v.* Gerber (C. A.) 247
Foster *v.* Parker 18
Fox *v.* Wallis (C. A.) 45

G.

Gabell *v.* South Eastern Railway Company (C. A.) 416
Gay *v.* Cadby 391
Gerber, French *v.* (C. A.) 247
Grant *v.* Banque Franco-Egyptienne (C. A.) 430
Grant *v.* Secretary of State for India 445
———, Twycross *v.* (C. A.) 469
Griffith *v.* Taylor (C. A.) 194
Griffits, Brantom *v.* (C. A.) 212

H.

Hammond, Roe *v.* 300
Harris *v.* Owners of Franconia 173
Harrison *v.* Carter 26
Hart *v.* Wall 146
Hawkins, Callander *v.* 592
Heather *v.* Webb 1
Higginson *v.* Simpson 76
Higham *v.* Wright 397
Huckle *v.* Wilson 410

PAGE

Humphries *v.* Cousins 239
Huntley, Omoa and Cleland Coal and Iron Company *v.* 464

J.

Jackson *v.* Metropolitan Railway Company (C. A.) 125
Janes, Daniel *v.* 351
Johnson *v.* Credit Lyonnais 224
Jupe, Allkins *v.* 375

K.

Keith *v.* Burrows (C. A.) 163
Kottgen, Shepherd *v.* 578
———, ——— *v.* (C. A.) 585

L.

Liverpool Brewery Company, Nelson *v.* 311

M.

Mackley *v.* Chillingworth 273
Manchester Carriage Company, Ellis *v.* 13
Melhado *v.* Watson (C. A.) 281
Metropolitan Railway Company, Jackson *v.* (C. A.) 125
Milner, Patrick *v.* 342
Mitchell, Rayner *v.* 357
Mostyn, Evans *v.* 547

N.

Nelson *v.* Liverpool Brewery Company 311
Netherclift, Seaman *v.* (C. A.) 53
Nicholl, Rumsey *v.* 179
———, ——— *v.* (C. A.) 294
Norris *v.* Beazley 80

O.

Omoa and Cleland Coal and Iron Company *v.* Huntley 464

P.

PAGE

Parker, Foster *v.* 18
——— *v.* South Eastern Railway Company (C. A.) 416
Parsons *v.* Tinling 119
Patrick *v.* Milner 342
Pearson *v.* Cox (C. A.) 369
Pixell, Caldow *v.* 562
Purcell *v.* Sowler (C. A.) 215

R.

Rayner *v.* Mitchell 357
Reuter's Telegraph Company, Dickson *v.* 62
Richardson *v.* Elmit 9
Robins, Dawson *v.* 38
Roe *v.* Hammond 300
Rourke *v.* White Moss Colliery Company (C. A.) 205
Rumsey *v.* Nicholl 179
——— *v.* ——— (C. A.) 294

S.

Samuels, Crom *v.* 21
Seaman *v.* Netherclift (C. A.) 53
Secretary of State for India, Grant *v.* 445
Shepherd *v.* Kottgen 578
——— *v.* ——— (C. A.) 585
Short, Siddons *v.* 572
Siddons *v.* Short 572
Simpson, Higginson *v.* 76
Smith, Eyre *v.* (C. A.) 435
Smithers, Whitehead *v.* 553
Soper *v.* Mayor of Basingstoke 440
South Eastern Railway Company, Gabell *v.* (C. A.) 416
South Eastern Railway Company, Parker *v.* (C. A.) 416
Sowler, Purcell *v.* (C. A.) 215

PAGE

Stern, Bessela *v.* (C. A.) 265
Stone *v.* Corporation of Yeovil (C. A.) 99

T.

Taylor *v.* Griffith (C. A.) 194
Terry, Crew *v.* 403
Thrift *v.* Youle & Co. 432
Tinling, Parsons *v.* 119
Tunbridge Wells Local Board *v.* Bisshopp 187
Twycross *v.* Grant (C. A.) 469
Tye, Warden *v.* 74

V.

Vanderzee, Frederici *v.* (C. A.) 70

W.

Wall, Hart *v.* 146
Wallis, Fox *v.* (C. A.) 45
Ward, Cook *v.* (C. A.) 255
Warden *v.* Tye 74
Watson, Melhado *v.* (C. A.) 281
Webb, Heather *v.* 1
White *v.* France 308
White Moss Colliery Company, Rourke *v.* (C. A.) 205
Whitehead *v.* Smithers 553
Wilson *v.* Breslauer (C. A.) 314
———, Huckle *v.* 410
Wright, Creen *v.* (C. A.) 354
———, Higham *v.* 397

Y.

Yeovil, Corporation of, Stone *v.* (C. A.) 99
Youle & Co., Thrift *v.* 432

# TABLE OF CASES CITED.

## A.


| | | PAGE |
|---|---|---|
| Abraham *v.* Reynolds | 5 H. & N. 143 | 207, 208 |
| Alchin *v.* Wells | 5 T. R. 470 | 303, 306 |
| Alexander *v.* Mackenzie | 6 C. B. 766 | 154, 159 |
| Allardice *v.* Robertson | 1 Dow. (N.S.) 495, 515 | 54, 58 |
| Alton *v.* Midland Railway Company | 19 C. B. (N.S.) 213 | 70 |
| Andree *v.* Fletcher | 2 T. R. 161, at p. 164 | 379, 380 |
| Ashbury Railway Carriage and Iron Company *v.* Richie | Law Rep. 7 H. L. 653 | 104 |
| Assop *v.* Yates | 2 H. & N. 768 | 311 |
| Astley *v.* Younge | 2 Burr. 807 | 54 |
| Austria, Emperor of, *v.* Day | 3 D. F. & J. 217, 240 | 575 |
| Aylesbury Case | 12 Journ. 490, cited 2 Doug. Elec. Ca. 126 | 29 |
| Ayres *v.* Sedgwick | Palm. 142, 144, 145 | 54 |


## B.


| | | |
|---|---|---|
| Bache *v.* Proctor | 1 Doug. at p. 384 | 90 |
| Bailey *v.* Johnson | Law Rep. 7 Ex. 263, at p. 265 | 408 |
| Baird *v.* Williamson | 15 C. B. (N.S.) 376 | 244 |
| Baker *v.* Oakes | 2 Q. B. D. 171; W. N. Jan. 20, 1877, p. 2 | 120, 594, 596 |
| Barnes *v.* Ward | 9 C. B. 392 | 371 |
| Bartonshill Coal Company *v.* Reid | 3 Macq. H. L. 266 | 207 |
| Barwick *v.* English Joint Stock Bank | Law Rep. 2 Ex. 259 | 65 |
| Batley *v.* Kynock | Law Rep. 20 Eq. 632 | 276, 278 |
| Beaufort (Duke of) *v.* Earl of Ashburnham | 13 C. B. (N.S.) 598 | 275 |
| Bedford Case | 2 Doug. Elec. Ca. 123 | 29 |
| Beeston *v.* Beeston | 1 Ex. D. 13 | 77, 78 |
| Bell *v.* Ansley | 16 East, 141 | 382 |
| —— *v.* Twentyman | 1 Q. B. 766 | 242 |
| Beyer v. Adams | 26 L. J. (Ch.) 841 | 77 |
| Bickerdike *v.* Bollman | 1 T. R. 405 | 19, 20 |
| Bilke *v.* Havelock | 3 Camp. 374 | 307 |
| Birmingham Gas-Light Company, Ex parte. Re Adams | 40 L. J. (Bky.) 1 | 319 |
| Blades *v.* Arundale | 1 M. & S. 711 | 307, 403 |
| Blake *v.* Done | 7 H. & N. 465 | 86 |
| Boehm *v.* Wood | 1 Jac. & W. 419 | 346 |
| Bolch *v.* Smith | 7 H. & N. 736 | 310 |
| Borradaile *v.* Brunton | 2 Moo. J. B. 582 | 479 |

| | | PAGE |
|---|---|---|
| Bowman *v.* Blyth | 7 E. & B. 26, 47 | 564 |
| Boydell *v.* M'Michael | 1 C. M. & R. 177 | 213 |
| Boyson *v.* Coles | 6 M. & S. 14 | 228, 236 |
| Bradbury *v.* Hotten | Law Rep. 8 Ex. 1 | 44 |
| Bridges *v.* North London Railway Company | Law Rep. 7 H. L. 213 | 126, 127, 130, 139, 145, 369, 373 |
| Broder *v.* Saillard | 2 Ch. D. 692 | 242, 244 |
| Brook *v.* Rawl | 4 Ex. 521 | 149 |
| Brown *v.* Tanner | Law Rep. 3 Ch. 597 | 164 |
| Buckley *v.* Wood | Cro. Eliz. 230, 248; 4 Co. 14 b. | 54 |
| Bush *v.* Trowbridge Waterworks Company | Law Rep. 19 Eq. 291; Law Rep. 10 Ch. 459 | 104, 106, 107, 115, 116, 117 |


## C.


| | | |
|---|---|---|
| Caledonian Railway Company *v.* Sprot | 2 Macq. 449 | 575 |
| Calver *v.* Roberts | 25 L. T. 751 | 443 |
| Campbell *v.* Im Thurn | 1 C. P. D. 207 | 287, 323, 325, 329, 331, 332, 335, 339 |
| Cann *v.* Clipperton | 10 A. & E. 582 | 200 |
| Carew *v.* Duckworth | Law Rep. 4 Ex. 313 | 19 |
| Carstairs *v.* Taylor | Law Rep. 6 Ex. 217 | 246 |
| Carter *v.* Flower | 16 M. & W. 743 | 19 |
| Chadwick *v.* Trower | 6 Bing. N. C. 1 | 241 |
| Chamberlain *v.* King | Law Rep. 6 C. P. 474 | 199 |
| Chapman *v.* Bowlby | 8 M. & W. 249 | 306 |
| Charlton *v.* Hay | 31 L. T. (N.S.) 437; 23 W. R. 129 | 481, 487, 488, 501, 535 |
| Chidley, Re | 1 Ch. D. 177 | 408 |
| Child *v.* Lord Abingdon | 1 Ves. Jun. 94 | 347 |
| Chinery *v.* Viall | 5 H. & N. 288 | 480 |
| Christopherson *v.* Latinga | 15 C. B. (N.S.) 809 | 71, 72 |
| Churton *v.* Frewen | 15 W. R. 559 | 276, 278 |
| Claydon *v.* Green | Law Rep. 3 C. P. D. 511 | 346 |
| Colchester Case | 1 Peck. 508 | 30 |
| Cole *v.* North Western Bank | Law Rep. 9 C. P. 470; Law Rep. 10 C. P. 354 | 228, 339 |
| Colebeck *v.* Girdlers Co. | 1 Q. B. D. 234 | 241 |
| Collen *v.* Wright | 7 E. & B. 301; 8 E. & B. 647 | 65, 68 |
| Collins *v.* Middle Level Commissioners | Law Rep. 4 C. P. 279 | 479 |
| Colt *v.* Bishop of Lichfield | Hob. 152; Owen, 12 | 296 |
| Colvin *v.* Newberry | 1 Cl. & F. 283, at p. 297 | 467 |
| Condon, Re | Law Rep. 9 Ch. 609, at p. 613. | 408 |
| Cook *v.* Chilcott | 3 Ch. D. 695 | 594 |
| —— v. Elphin | 5 Bligh. (N.S.) 103 | 184 |
| Cookson *v.* Bank of England | 13 Ir. C. Law Rep. at p. 438 | 153 |
| Corby *v.* Hill | 4 C. B. (N.S.) 556 | 310 |
| Corey *v.* Scott | 3 B. & Ald. 619 | 19 |
| Cornell *v.* Hay | Law Rep. 8 C. P. 328 | 481, 487, 488, 511, 534, 535 |
| Cornfoot *v.* Fowke | 6 M. & W. 358 | 65 |
| Cornish *v.* Abington | 4 H. & N. 549 | 419 |
| ——— *v.* Rowley | 1 Selw. N. P. ch. vii. pp. 218, 219, 13th ed. | 347 |
| Corry *v.* Coulthard | 2 C. P. D. pp. 583, 584 | 581, 583, 588, 589, 590, 591 |

| | | PAGE |
|---|---|---|
| Couch *v.* Steel | 3 E. & B. 402 | 311 |
| Coventry Case | 16 Journ. 129 | 30 |
| Cowles *v.* Gale | Law Rep. 7 Ch. 12 | 346 |
| Craig *v.* Phillips | 3 Ch. D. 722 | 481, 488, 539 |
| Creen *v.* Wright | 1 C. P. D. 591 | 354 |
| Crisp *v.* Bunbury | 8 Bing. 394 | 414 |
| Crockett *v.* Dodge | 3 Fair, 190 | 586 |
| Croft *v.* London and North Western Railway Company | 3 B. & S. 436 | 104 |
| | 2 C. P. D. 21 | 45 |
| Crom *v.* Samuels | 2 Co. Rep. 74 b | 182, 296 |
| Cromwell's (Lord) Case | 6 East, 602 | 213 |
| Crosby *v.* Wadsworth | 9 Ex. 604 | 158 |
| Crowe *v.* Clay | 2 Dr. & Sm. 355 | 15, 16, 17 |
| Curriers' Company *v.* Corbett | | |


## D.


| | | |
|---|---|---|
| D'Almaine *v.* Boosey | 1 Y. & C. Ex. 301 | 43 |
| Dalyell *v.* Tyrer | E. B. & E. 899 | 207 |
| D'Arcy *v.* Tamar, Kit Hill, and Callington Railway Company | Law Rep. 2 Ex. 158 | 260, 262 |
| Davidson *v.* Tulloch | 3 Macq. 783, 790 | 479, 489 |
| Davis *v.* Duncan | Law Rep. 9 C. P. 396 | 216 |
| ——— *v.* Garrett | 6 Bing. 716 | 479 |
| Davison *v.* Duncan | 7 E. & B. 229 | 216, 217 |
| Dawkins *v.* Lord Paulet | Law Rep. 5 Q. B. 94 | 462 |
| ——— *v.* Lord Rokeby | Law Rep. 7 H. L. 744, 752, 754 | 54, 58, 59, 60 |
| Day *v.* Luhke | Law Rep. 5 Eq. 336 | 346 |
| De Mattos *v.* North | Law Rep. 3 Ex. 185 | 379, 380, 381, 384, 389 |
| Devaux *v.* J'Anson | 5 Bing. N. C. 519 | 165 |
| Dickson *v.* Lord Combermere and General Peel | 3 F. & F. 527, 585 | 458 |
| Dodds *v.* Shepherd | 1 Ex. D. 75 | 120, 123 |
| ——— *v.* Thompson | Law Rep. 1 C. P. 133 | 39, 40 |
| —— *d.* Kirby *v.* Carter | R. & M. 237 | 184 |
| Downes *v.* Craig | 9 M. & W. 166, at p. 170 | 182, 185, 296 |
| Downing *v.* Capell | Law Rep. 2 C. P. 461 | 199 |
| Downton Case | 1 Lud. 193 | 30 |
| Dyer *v.* Pearson | 3 B. & C. 38 | 228 |


## E.


| | | |
|---|---|---|
| Ebsworth *v.* Alliance Marine Insurance Company | Law Rep. 8 C. P. 596 | 382 |
| Edwards *v.* Coombe | Law Rep. 7 C. P. 519 | 285 |
| ——— *v.* Lowther | 45 L. J. (C.P.) 419 | 87 |
| Elliott *v.* North Eastern Railway Company | 10 H. L. C. 333 | 575 |
| England, Re | Law Rep. 12 Eq. 207 | 407, 410 |
| Eyre *v.* Bartrop | 3 Madd. 221, Tu. L. C. 901 | 47, 51, 52 |

## F.


| | | PAGE |
|---|---|---|
| Fenton *v.* City of Dublin Steam Packet Company | 8 A. & E. 835 | 466 |
| Ferrand *v.* Corporation of Bradford | 21 Beav. 412 | 104, 107, 112, 115, 116 |
| Fletcher *v.* Braddick | 2 B. & P. (N.R.) 182 | 466 |
| ——— *v.* Rylands | 3 H. & C. 774; Law Rep. 1 Ex. 265–6; Law Rep. 3 H. L. 330 | 240, 241, 242, 245 |
| Flight *v.* Reed | 1 H. & C. 703 | 4 |
| Flint *v.* Flemyng | 1 B. & Ad. 45 | 165 |
| Francesco *v.* Massey | Law Rep. 8 Ex. 101 | 249 |
| Frewen *v.* Phillips | 11 C. B. (N.S.) 449 | 14 |
| Fuentes *v.* Montes | Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93 | 228 |


## G.


| | | |
|---|---|---|
| Gale *v.* Ablett | 8 Jur. (N.S.) 987 | 594 |
| Garnet *v.* Bradley | 2 Ex. D. 349 | 355 |
| Gibson *v.* East India Company | 5 Bing. N. C. 262, 274 | 456, 458 |
| Gidley *v.* Lord Palmerston | 1 B. & B. 275 | 461 |
| Gleaves *v.* Marriner | 1 Ex. D. 107 | 563, 565 |
| Gloucestershire Case | Orme's Elec. Laws, 121 | 30 |
| Glover *v.* Bishop of Coventry and Litchfield | Hob. 152; Owen, 12 | 183 |
| Goldney *v.* Lording | Law Rep. 8 Q. B. 182 | 285 |
| Goodwin *v.* Robarts | 1 App. Cas. 476 | 228 |
| Gover's Case | 1 Ch. D. 182 | 478, 479, 481, 485, 486, 487, 488, 500, 511, 536, 539, 546 |
| Gravatt *v.* Attwood | 21 J. L. (Q.B.) 215 | 276 |
| Gray *v.* Carr | Law Rep. 6 Q. B. 522 | 249 |
| Great Western Railway Company *v.* Bennett | Law Rep. 2 H. L. 27 | 575 |
| Greenwood *v.* Churchill | 8 Beav. 413 | 346 |
| Grendon *v.* Bishop of Lincoln | Plowd. 3 E. 3, c. 18 | 182 |
| Grizewood *v.* Blane | 11 C. B. 538 | 78 |
| Gumm *v.* Tyrie | 4 B. & S. 680; 6 B. & S. 298 | 164 |
| Gwinnell *v.* Eamer and Wife | Law Rep. 10 C. P. 658 | 313 |


## H.


| | | |
|---|---|---|
| Hall, Re | Law Rep. 6 Ch. 795 | 408 |
| Hallams *v.* Hills | 24 W. R. 956 | 22, 23 |
| Hammond *v.* St. Pancras Vestry | Law Rep. 9 C. P. 316 | 241, 245 |
| Hanway *v.* Boultbee | 1 Mood. & Rob. 15, 18, 19 | 200 |
| Hansard *v.* Robinson | 7 B. & C. 90 | 158 |
| Hardcastle *v.* South Yorkshire Railway Company | 4 H. & N. 67 | 371 |
| Harding *v.* Bullman | 1 Brown. & Golds. 2 | 54 |
| Harris *v.* Great Western Railway Company | 1 Q. B. D. 515 | 418, 420, 421 |
| Hartel, Ex parte | Law Rep. 8 Ch. 743, 745 | 438 |

| | | PAGE |
|---|---|---|
| Hatton, Re | Law Rep. 7 Ch. 723 | 285 |
| Hawkes *v.* Saunders | 1 Cowp. 289 | 4 |
| Helene, The | B. & L. 429 | 433 |
| Henderson *v.* Broomhead | 4 H. & M. 569 | 54, 61 |
| ——— *v.* Stevenson | Law Rep. 2 H. L., Sc. 470 | 418, 421, 429 |
| Henwood *v.* Harrison | Law Rep. 7 C. P. 606 | 216, 217 |
| Hereford, Bishop of, *v.* Adams | 7 Ves. 324 | 34 |
| Herschfeld *v.* Clerk | 11 Ex. 712 | 71 |
| Hext *v.* Gill | Law Rep. 7 Ch. 699 | 576 |
| Hill *v.* Fox | 4 H. & N. | 359 |
| —— *v.* Gray | 1 Stark. 434 | 479 |
| Hills *v.* Balls | 2 H. & N. 299 | 479 |
| Hipwell *v.* Knight | 1 Y. & C. Ex. in Eq. 401, at p. 416 | 345 |
| Hodges *v.* Bennett | 5 H. & N. 625 | 269 |
| Hodgkinson *v.* Ennor | 4 B. & L. 229 | 240, 242 |
| Hodgson *v.* Gascoigne | 5 B. & Ald. 88 | 213 |
| ——— *v.* Scarlett | 1 B. & Ald. 232 | 54 |
| Holmes *v.* North Eastern Railway Company | Law Rep. 4 Ex. 254; Law Rep. 6 Ex. 123 | 309 |
| Holt and Glover *v.* Bishop of Lichfield | Hob. 152; Owen, 12 | 183, 185 |
| Horley *v.* Rogers | 2 E. & E. 674 | 199 |
| Horn *v.* Ion | 4 B. & Ad. 78 | 438 |
| Houghton *v.* Koening | 18 C. B. 235 | 89 |
| Howard *v.* Bodington | 2 P. D. 203 | 564, 567 |
| ——— *v.* Tucker | 1 B. & Ad. 712 | 164 |


## I.


| | | |
|---|---|---|
| Imperial Mercantile Credit Association *v.* Coleman | Law Rep. 6 H. L. 189 | 481 |
| Indermaur *v.* Dames | Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311 | 310, 311 |
| India, The Secretary of State for, *v.* Sahaba | 13 Moo. P. C. 22, at p. 77 | 455 |


## J.


| | | |
|---|---|---|
| James, Ex parte | Law Rep. 9 Ch. 609, at p. 613 | 408 |
| Johnson *v.* Chapman | 19 C. B. (N.S.) 563, at p. 582 | 582, 585, 586, 587 |
| ———, Re | Law Rep. 7 Ch. 325 | 403 |
| ——— *v.* Lansley | 12 C. B. 468 | 77, 78 |
| John Waller Poe | 5 B. & Ad. 681 | 455 |
| Jones, Ex parte | Law Rep. 10 Ch. 663 | 408 |
| ——, Ex parte | Law Rep. 16 Eq. 386 | 437 |
| —— *v.* Flint | 10 Ad. & E. 753 | 213 |
| —— *v.* Phelps | 20 W. R. 92 | 3, 7, 9 |
| Jordin *v.* Crump | 8 M. & W. 782 | 351, 352 |


## K.


| | | |
|---|---|---|
| Keates *v.* Cadogan | 10 C. B. 591 | 481 |
| Kelly *v.* Tinling | Law Rep. 1 Q. B. 699 | 216 |
| Kelcey *v.* Stubbles | 1 H. & C. 576 | 120, 122 |

| | | PAGE |
|---|---|---|
| Kennedy *v.* Panama and New Zealand, &c., Royal Mail Company | Law Rep. 2 Q. B. 580, 587 | 479 |
| ——— *v.* Hilliard | 10 Ir. C. L. Rep. 195 | 54 |
| King, Ex parte | Law Rep. 17 Eq. 332 | 288 |
| Kingsford *v.* Great Western Railway Company | 16 C. B. (N.S.) 761 | 71 |
| Kirkpatrick *v.* Tattersall | 13 M. & W. 766 | 3 |
| Kish *v.* Cory | Law Rep. 10 Q. B. 553 | 249 |
| Knowles *v.* Brooking | 2 C. B. 226 | 442 |

L.

| | | |
|---|---|---|
| Laffitte & Co., Re | Law Rep. 20 Eq. 650 | 276, 277, 278 |
| Lambert *v.* Bessey | Sir T. Raym. 421 | 245 |
| Laugher *v.* Pointer | 5 B. & C. 547 | 466 |
| Lee *v.* Grinnell | 5 Duer. 400 | 586 |
| —— *v.* Riley | 18 C. B. (N.S.) 722 | 479 |
| Lewis *v.* Davis | Law Rep. 10 Ex. 86, at p. 91 | 564 |
| ——— *v.* M'Kee | Law Rep. 4 Ex. 58 | 419, 429 |
| Liverpool Borough Bank *v.* Turner | 2 De G. F. & J. 502 | 566 |
| Liverpool Credit Company *v.* Wilson | Law Rep. 7 Ch. 507 | 165 |
| Lloyd *v.* Lewis | 2 Ex. D. 7 | 73 |
| Lord Cromwell's Case | 2 Co. Rep. 74 b. | 182, 296 |
| Lord Palmerston *v.* Turner | 33 Beav. 524 | 346 |
| Lucena *v.* Craufurd | 2 B. & P. (N.R.) 269, at p. 311 | 379, 380, 384 |
| Lyndon *v.* Standbridge | 2 H. & N. 45 | 394 |

M.

| | | |
|---|---|---|
| Macbeath *v.* Haldimand | 1 T. R. 172 | 461 |
| Mackay *v.* Ford | 5 H. & N. 792 | 54 |
| Maltass *v.* Siddle | 6 C. B. (N.S.) 494 | 19 |
| Manchester and Liverpool District Banking Company, Ex parte. Re Littler | Law Rep. 18 Eq. 249 | 319 |
| Marston *v.* Allen | 8 M. & W. 494 | 183 |
| Martin *v.* Powning | Law Rep. 4 Ch. 356, at pp. 366, 367 | 436, 437, 438, 439 |
| Masters *v.* Lowther | 11 C. B. 948, at p. 953 | 305 |
| Mather *v.* Brown | 1 C. P. D. 596 | 442, 443, 444 |
| M'Combie *v.* Davies | 6 East, 538 | 228 |
| McSwiney *v.* Royal Exchange Assurance Company | 14 Q. B. 634, 646 | 382 |
| Megrath *v.* Gray | Law Rep. 9 C. P. 216 | 324 |
| Melbourne *v.* Greenfield | 7 C. B. (N.S.) 1 | 442 |
| Meule *v.* Goddard | 5 B. & Al. 766 | 355 |
| Meux *v.* Jacobs | Law Rep. 7 H. L. 481 | 213 |
| Michell *v.* Brown | 1 E. & E. 267 | 557 |
| Middlesex, Sheriff of, Ex parte | Law Rep. 12 Eq. 207. | 407, 410 |
| Milvain *v.* Perez | 3 E. & E. 495 | 249 |
| Mitchell *v.* Crassweller | 13 C. B. 237 | 358, 359 |
| Moens *v.* Hayworth | 10 M. & W. 147 | 65 |
| Moore *v.* Watson | Law Rep. 2 C. P. 314 | 120, 122, 123 |
| Monk *v.* Whittenbury | 2 B. & Ad. 484 | 228 |
| Morgan *v.* Vale of Neath Railway Company | 5 B. & S. 570 | 207 |
| Morris *v.* Ogden | Law Rep. 4 C. P. 687, 702 | 182 |

| | | PAGE |
|---|---|---|
| Morrison *v.* Glover | 4 Ex. 430 | 412 |
| Mortimer *v.* Broadwood | 20 L. T. (N.S.) 398; 17 W. R. 653 | 380, 381, 384, 387, 389 |
| Morton *v.* Woods | Law Rep. 4 Q. B. 293 | 90 |
| Mullett *v.* Mason | Law Rep. 1 C. P. 559 | 479 |
| Murray *v.* Currie | Law Rep. 6 C. P. 24 | 207, 208 |

N.

| | | |
|---|---|---|
| Napier, Ex parte | 21 L. J. (Q.B.) 332 | 457 |
| Nash *v.* Dickenson | Law Rep. 2 C. P. 252 | 303 |
| Neporter, The | Law Rep. 2 A. & E. 375 | 433, 434 |
| Newberry *v.* Colvin | 7 Bing. 190 | 467 |
| Newman *v.* Rogers | 4 Bro. C. C. 391 | 345 |
| New Sombrero Phosphate Company *v.* Erlanger | 5 Ch. D. 73 | 481, 488 |

O.

| | | |
|---|---|---|
| Oakes *v.* Turquand | Law Rep. 2 H. L. 325 | 481 |
| Odgen *v.* Benas | Law Rep. 9 C. P. 513. | 153 |
| Ormrod *v.* Huth | 14 M. & W. 651 | 65, 68, 69 |

P.

| | | |
|---|---|---|
| Palmer *v.* Fletcher | 2 Lev. 122; 1 Sid. 167, 227 | 16 |
| Palmerston, Lord, *v.* Turner | 33 Beav. 524 | 346 |
| Pannell, Ex parte | Not yet reported | 438 |
| Paper Staining Company, Ex parte | Law Rep. 8 Ch. 595 | 285 |
| Parker *v.* M'Kenna | Law Rep. 10 Ch. 96 | 481 |
| Parkin *v.* Thorold | 16 Beav. 59, at p. 65 | 347, 349 |
| Parsons *v.* Tinling | 2 C. P. D. 119 | 355 |
| Patten *v.* Rea | 2 C. B. (N.S.) 606 | 359 |
| Pattison *v.* Gilford | Law Rep. 18 Eq. 259, at p. 263 | 575 |
| Payne, Ex parte | 5 D. & L. 679 | 414 |
| ——— *v.* Rogers | 2 H. Bl. 349 | 313 |
| Peacock, Ex parte | Law Rep. 8 Ch. 682 | 285, 287, 319 |
| ——— *v.* Purvis | 2 B. & B. 362 | 213 |
| Pearse *v.* Morrice | 3 B. & Ad. 396 | 92 |
| Peek *v.* Gurney | Law Rep. 6 H. L. 377 | 481 |
| Pickering *v.* Busk | 15 East, 38 | 208, 256 |
| Pike *v.* Nicholas | Law Rep. 5 Ch. 251 | 43, 44 |
| Planché *v.* Braham | 4 Bing. N. C. 17 | 43 |
| Playford *v.* United Kingdom Telegraph Company | Law Rep. 4 Q. B. 706 | 65, 67, 69 |
| Polak *v.* Everett | 1 Q. B. D. 669 | 47 |
| Pollock *v.* Campbell | 1 Ex. D. 50 | 81, 84 |
| Popham *v.* Pickburn | 7 H. & N. 891 | 217, 222 |
| Powell *v.* Salisbury | 2 Y. & J. 391 | 479 |
| Prentice *v.* London | Law Rep. 10 C. P. 679 | 412 |
| Pretty and Wife *v.* Bickmore | Law Rep. 8 C. P. 401 | 313 |
| Purnell *v.* Great Western Railway Company and Harris | Reported on a point of practice, 1 Q. B. D. 636 | 210 |

Q.

| | | |
|---|---|---|
| Quarman *v.* Burnett | 6 M. & W. 499 | 466 |

## R.


| | | PAGE |
|---|---|---|
| Ralli *v.* Janson | 6 E. & B. 422 | 381 |
| Randell *v.* Trimen | 18 C. B. 786 | 65, 68 |
| Ranking *v.* Forbes | 34 Just. of Peace, 486 | 570, 571 |
| Rankin *v.* Potter | Law Rep. 6 H. L. 83 | 380 |
| Rawlings *v.* Bell | 1 C. B. 951 | 65, 68, 69 |
| Rayner, Ex parte | Law Rep. 7 Ch. 325 | 403 |
| Read *v.* Coker | 13 C. B. 850 | 199 |
| Reading Case | 16 Journ. 27 | 30 |
| Reeves *v.* White | 17 Q. B. at p. 1016 | 414 |
| Reg. *v* Ingall | 2 Q. B. D. 199 | 564, 565 |
| —— *v.* Keyn | 2 Ex. D. 63 | 174, 176, 177, 178 |
| —— *v.* Mayor of Lichfield | 2 Q. B. 693 | 31, 34 |
| —— *v.* Plenty | Law Rep. 4 Q. B. 346 | 442 |
| —— *v.* Prince | Law Rep. 2 C. C. R. 154 | 481 |
| —— *v.* Tugwell | Law Rep. 3 Q. B. 704 | 442 |
| Revis *v.* Smith | 18 C. B. 126, 141 | 54 |
| Rex *v.* Burnett | 4 M. & S. 272 | 191 |
| —— *v.* Curran | 3 C. & P. 397 | 200 |
| —— *v.* Halesworth | 3 B. & Ad. 717 | 32 |
| —— *v.* Justices of Denbighshire | 4 East, 142 | 564 |
| —— *v.* Loxdale | 1 Burr. 445, at pp. 447, 449, 450 | 564 |
| —— *v.* Mayor of Norwich | 1 B. & Ad. 310 | 564 |
| —— *v.* Robinson | 2 C. M. & R. 334 | 306 |
| —— *v.* Skinner | Loft. 55 | 54 |
| —— *v.* Sparrow | 2 Str. 1123 | 564 |
| —— *v.* Vantandillo | 4 M. & S. 73 | 191 |
| Reynal, Ex parte | 2 M. D. & De G. 443 | 213 |
| Reynell *v.* Sprye | 21 L. J. (Ch.) 633 | 481 |
| Riley *v.* Baxendale | 6 H. & N. 445 | 311 |
| Rimini *v.* Van Praagh | Law Rep. 8 Q. B. 1 | 4 |
| Roe *v.* Davis | 7 East, 363 | 89 |
| Roberts *v.* Orchard | 2 H. & C. 769 | 199 |
| Robson *v.* North Eastern Railway Company | 2 Q. B. D. 85 | 126 |
| Rochester, Mayor of, *v.* Reg. | E. B. & E. 1024 | 564 |
| Rocke, Ex parte | Law Rep. 6 Ch. 795 | 408 |
| Rose *v.* North Eastern Railway | 2 Ex. D. 248 | 126 |
| Ross *v.* Fedden | Law Rep. 7 Q. B. 661 | 241, 246 |
| Rourke *v.* Short | 5 E. & B. 904 | 78 |
| ——— *v.* White Moss Colliery Company | 2 C. P. D. 205 | 467 |
| Ruffle, Ex parte | Law Rep. 8 Ch. 997 | 285 |
| Russell *v.* Shenton | 3 Q. B. 449 | 245, 247, 313 |


## S.


| | | |
|---|---|---|
| Sack *v.* Ford | 13 C. B. (N.S.) 90 | 467 |
| Sadler *v.* Henlock | 4 E. & B. 570 | 370 |
| Sampson *v.* Mackay | Law Rep. 4 Q. B. 643 | 120 |
| Samuell *v.* Howarth | 3 Mer. 272 | 47 |
| Sandeman *v.* Scurr | Law Rep. 2 Q. B. D. 86 | 467 |
| Sandwich Case | 10 Journ. 457 | 33 |
| Sanguinetti *v.* Pacific Steam Navigation Company | 2 Q. B. 238 | 249 |
| Scholefield *v.* Lockwood | Law Rep. 7 Eq. 83 | 365, 366 |
| Schuster *v.* McKellar | 7 E. & B. 704 | 466 |

| | | PAGE |
|---|---|---|
| Scott *v.* London and St. Katharine Docks Company | 3 H. & C. 596 | 309 |
| —— *v.* Lord Seymour | 1 H. & C. 219 | 176 |
| —— *v.* Royal Wax Candle Company | 1 Q. B. D. 404 | 175 |
| —— *v.* Stansfield | Law Rep. 3 Ex. 220 | 170 |
| Secretary of State for India *v.* Sahaba | 12 Moo. P. C. 22, at p. 77 | 455 |
| Seymour *v.* Maddox | 16 Q. B. 326 | 311 |
| Simpson *v.* Henning | Law Rep. 10 Q. B. 406 | 309 |
| Sinden *v.* Banks | 2 E. & E. 623 | 412 |
| Slater *v.* Hayward R. Co. | 26 Conn. 128 | 586 |
| —— *v.* Pinder | Law Rep. 6 Ex. 228; Law Rep. 7 Ex. 95 | 170, 408 |
| Small *v.* Batho | 21 L. J. (Q.B.) 254 | 276 |
| Smith *v.* Brown | Law Rep. 6 Q. B. 729 | 176 |
| —— *v.* Buller | Law Rep. 19 Eq. 473 | 276, 278 |
| —— *v.* Green. | 1 C. P. D. 92. | 479 |
| —— *v.* Hall | 15 C. B. (N.S.) 485 | 30, 35, 37 |
| —— *v.* Kay | 7 H. L. C. 750 | 481 |
| —— *v.* Kenrick | 7 C. B. 515 | 243, 244 |
| —— *v.* Reynolds | 1 H. & N. 221 | 379, 380, 381, 384, 389 |
| —— *v.* Thackerah | Law Rep. 1 C. P. 564. | 574, 576 |
| Sneary *v.* Abdy | 1 Ex. D. 299 | 306 |
| Sneesby *v.* Lancashire and Yorkshire Railway Company | Law Rep. 9 Q. B. 263. | 479 |
| Southcote *v.* Stanley | 1 H. & N. 247 | 311 |
| Spence *v.* Union Marine Insurance Company | Law Rep. 3 C. P. 427. | 382 |
| Spyve *v.* Topham | 3 East, 115 | 90, 97 |
| Stafford, A Coroner for, Re | 2 Russ. 475, at p. 483, per Abbott, C.J. | 563 |
| Stagg *v.* Elliott | 12 C. B. (N.S.) 373 | 159 |
| Steele *v.* Bosworth | Hop. & Ph. 106; 18 C. B. (N.S.) 22 | 41 |
| Stewart *v.* North Western Railway Company | 3 H. & C. 135 | 429 |
| Stockdale *v.* Dunlop | 6 M. & W. 224 | 382 |
| Stone *v.* Commercial Railway Company | 4 M. & Cr. 122; 1 Ry. Cas. 375 | 11 |
| —— *v.* Thomas | Law Rep. 5 Ch. 219 | 437 |
| Story *v.* Ashton | Law Rep. 4 Q. B. 476, 479 | 358 |
| Stowe *v.* Jolliffe | Law Rep. 9 C. P. 734 | 28 |
| Strickland *v.* Maxwell | 2 Cr. & M. at p. 549 | 92 |
| Sudbury, Cole's Case | Phillips Elec. Ca. 149 | 30 |
| Sullivan *v.* Waters | 14 Ir. C. L. Rep. 460 | 310 |
| Sutton *v.* Johnstone | 1 T. R. 493, 784 | 463 |
| Swinfen *v.* Bacon | 6 H. & N. 184, 846 | 480 |


## T.


| | | |
|---|---|---|
| Tapp *v.* Jones | Law Rep. 10 Q. B. 591 | 11 |
| Taunton Case | 18 Journ. 266 | 30 |
| Tenant *v.* Goldwin | 2 Ld. Raym. 1093; 1 Salk. 360 | 15, 16, 240, 241, 242, 244, 245 |
| Terry *v.* Parker | 6 A. & E. 502 | 19 |
| Thames, Conservators of, *v.* Hall | Law Rep. 1 C. P. 421 | 120, 123 |
| Thellusson *v.* Fletcher | 1 Doug. 315 | 379 |
| Thomas *v.* Churton | 2 B. & S. 475 | 54 |
| —— *v.* Sylvester | Law Rep. 8 Q. B. 368 | 39, 40 |

| | | PAGE |
|---|---|---|
| Thompson *v.* Planet Benefit Building Society | Law Rep. 15 Eq. 333 | 414 |
| Todd *v.* Flight | 9 C. B. (N.S.) 377 | 313 |
| Toomey *v.* London, Brighton, and South Coast Railway Company | 3 C. B. (N.S.) 146 | 309 |
| Trotman *v.* Dunn | 4 Camp. 211 | 54, 56 |
| Trueman *v.* Fenton | 2 Coup. 544 | 4 |
| Truscott *v.* Merchant Taylors' Company | 11 Ex. 863 | 14 |
| Tuffnell, In re | 3 Ch. D. 164 | 458 |
| Turner *v.* Samson | 2 Q. B. D. 23 | 20 |

U.

| | | |
|---|---|---|
| Udell *v.* Atherton | 7 H. & N. 172 | 480 |
| Unwin *v.* Walesly | 1 T. R. 674 | 462 |

V.

| | | |
|---|---|---|
| Villars, Ex parte | Law Rep. 9 Ch. 432 | 408 |
| Van Toll *v.* South Eastern Railway Company | 12 C. B. (N.S) at p. 87 | 428, 429 |
| Vaux *v.* Vollans | 4 B. & Ad. 525 | 564, 567 |
| Venezuela Railway Company *v.* Kisch | Law Rep. 2 H. L. 99, at p. 120 | 481 |
| Vickers *v.* Hertz | Law Rep. 2 H L., Sc. 113 | 228 |

W.

| | | |
|---|---|---|
| Waller *v.* Eastern Countries Railway Company | 6 Hare, 600 | 11 |
| Walsh *v.* The Secretary of State for India | 10 H. L. C. 367 | 460 |
| Walter, Ex parte | 2 Ch. D. 326, 334 | 437 |
| Washbourn *v.* Burrows | 1 Ex. 107 | 213 |
| Wason *v.* Walter | Law Rep. 4 Q. B. 73 | 216, 217, 219, 222, 223 |
| Watson *v.* Swann | 11 C. B. (N.S.) 756 | 382 |
| Webb *v.* Giggs | 4 M. & S. 113 | 39 |
| ——— *v.* Hughes | Law Rep. 10 Eq. 281 | 347, 349, 350 |
| Weguelin *v.* Collier | Law Rep. 6 H. L. 286 | 165 |
| Wells *v.* Maxwell | 32 Beav. 408 | 346 |
| Wennall *v.* Adney | 3 B. & P. 247, 249 | 4 |
| Westbury, Borough of, Case | 18 Journ. 154 | 33 |
| Whitaker *v.* Forbes | Law Rep. 10 C. P. 583 | 39 |
| White *v.* Bass | 7 H. & N. 722 | 14, 15, 16 |
| ——— *v.* James | 26 Beav. 191 | 40 |
| Whycherley *v.* Barnard | Joh. 41 | 45 |
| Wiggett *v.* Fox | 11 Ex. 832 | 207, 208 |
| Wilkinson *v.* Fairrie | 1 H. & C. 633 | 309 |
| Wilson *v.* Hood | 3 H. & C. 148 | 365, 366 |
| ——— *v.* Wilson | 5 H. L. C. 40, 66 | 89, 98 |
| Wirth *v.* Austin | Law Rep. 10 C. P. 689 | 19 |
| Wren *v.* Weild | Law Rep. 4 Q. B. 730 | 149 |
| Wright *v.* Davies | 1 C. P. D. 638 | 563 |
| ——— *v.* Deeley | 4 H. & C. 209 | 413 |

Y.

| | | |
|---|---|---|
| Young *v.* Macrae | 3 B. & S. 264 | 149 |

# CASES

DETERMINED BY THE

# COMMON PLEAS DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL FROM THE COMMON PLEAS DIVISION

## XL VICTORIA.

---

### HEATHER & SON *v.* WEBB.

1876
*Nov.* 16.

*Bankruptcy—Liquidation by Arrangement—Absence of Notice of Proceedings to Creditors—Subsequent Promise to pay Debt barred by Bankruptcy—* 32 & 33 *Vict. c.* 71, *ss.* 49, 127.

To a statement of defence, setting up that the defendant was discharged from the claim by an order of discharge obtained by him as the result of proceedings for liquidation by arrangement subsequent to the accrual of the claim, the plaintiffs replied that they had had no notice of the liquidation proceedings until long after they had been concluded, and that the defendant had not inserted the names of the plaintiffs as his creditors, or their debt in any list, statement, or document, forming any part of the proceedings, and that subsequently to the close of the proceedings the defendant had promised to pay the claim:—

*Held*, a bad reply.

STATEMENT of claim incorporated the particulars set forth in the special indorsement on the writ, which were in respect of work done by the plaintiffs for the defendant, in the year 1873.

The 2nd paragraph of the statement of defence stated that proceedings for liquidation by arrangement under the Bankruptcy Act, 1869, had been taken by the defendant, that a trustee had been appointed in whom the estate and effects of the defendant became vested, and that the discharge of the defendant had been

1876

HEATHER v. WEBB.

duly granted by a special resolution of the creditors, and thereupon the defendant obtained from the Court of Bankruptcy an order and certificate of discharge from all debts and liabilities in the prescribed form; and the defendant further said that the plaintiffs' cause of action, if any, occurred before the defendant's said discharge.

Reply to the 2nd paragraph of the statement of defence, that the plaintiffs had no notice of the proceedings in bankruptcy or liquidation at any time during the said proceedings, nor did the plaintiffs become aware of the same until long after the said proceedings were concluded, and that the defendant did not insert the names of the plaintiffs, or either of them, as among his creditors, or the debt, or any part thereof, sought to be recovered in this action, in any list, statement, document, or papers, forming part of the said proceedings, nor give, or cause to be given, any notice of any meetings, as required by the said Bankruptcy Act, 1869, and that since the close of the said proceedings the defendant promised and agreed to pay the full amount of the plaintiffs' claim.

Demurrer to the reply and joinder.

*Ridley*, for the defendant. The 127th section of the Bankruptcy Act, 1869, makes the registration by the registrar of the resolution of creditors discharging the debtor conclusive evidence that all the requisitions of the Act in respect of such resolution have been complied with. Consequently the fact that the plaintiffs had no notice of the liquidation proceedings, and that the debt was not inserted in the list, affords no ground of reply to the defence. With regard to the subsequent promise to pay the debt, the effect of the 49th section of the Bankruptcy Act, 1869, is different from that of the sections of previous Acts in pari materiâ. The effect is not only to bar the remedy, but to destroy the debt. Such debt cannot, therefore, afford a good consideration for the subsequent promise to pay. The ratio decidendi of the cases, in which it was held that a debt barred by bankruptcy could be revived by a subsequent express promise, was that the remedy only was gone, but the debt continued to exist, and so there was such a moral obligation to pay it as would afford a sufficient consideration to support the express promise. [He cited 6 Geo. 4, c. 16, s. 131; 5 & 6 Vict.

c. 122, ss. 37, 43; 12 & 13 Vict. c. 106, ss. 200, 204; 24 & 25 Vict. c. 134, ss. 161, 164; *Kirkpatrick* v. *Tattersall* (1); *Jones* v. *Phelps*. (2)]

*Willis*, for the plaintiffs. It is submitted that the failure to take any of the proper steps to give notice of the liquidation proceedings to the plaintiffs prevents the discharge from affecting them. The 127th section was not meant to cover such a defect as this. It was meant to cover irregularities of procedure, but not to cause creditors to be bound by proceedings to which they could not possibly be parties. It is admitted that prior to 6 Geo. 4, c. 16, a debt barred by bankruptcy might be revived by an express promise. That Act (section 131) provided expressly that no such promise should be of any avail unless in writing. The subsequent Acts have all contained express provisions by which it was enacted that such promises should not revive the debt. The present Act is entirely silent with regard to the effect of such promises, and contains no such provisions as have been inserted in the previous Acts. The only possible conclusion from this is that the legislature intended to revert to what was the well-settled law long before 6 Geo. 4, c. 16. No legitimate inference to the contrary can be drawn from the trifling alteration of the language of the 49th section from that used in the sections of previous Acts relating to the discharge of the bankrupt. It is incredible that the legislature, having before them the series of particular sections expressly relating to this subject in previous Acts, should, if they intended to re-enact the same law, have omitted any particular reference to the subject, and relied on such trifling alterations of phraseology as the use of the word "release" in the 49th section, instead of "discharge." In previous Acts the terms "discharged" and "released" have been used indiscriminately, as meaning the same thing with regard to bankrupts. Even if the debt is released, and so extinguished, it is contended that the substantial meaning of the decisions with regard to the revival of a debt by an express promise is that the fact of the debt having once existed, and never been paid, is a sufficient moral obligation to form a good consideration for a promise to pay it. The distinction for this purpose between a debt which is extinguished and a debt the remedy for

(1) 13 M. & W. 766. (2) 20 W. R. 92.

1876

HEATHER v. WEBB.

which merely is barred, is a narrow technicality, and is not the real ground of the decisions.

[LORD COLERIDGE, C.J. Is not this, within the terms of s. 49, a proceeding "in respect of" the debt from which the debtor is discharged?]

It is submitted not. The cause of action is not the old debt, but the breach of the new promise. Viewing the section in the light of the previous sections of a similar character, it cannot have been intended that the words "in respect of" should introduce any change of the law. They are only equivalent to "for." [He cited *Flight* v. *Reed* (1); *Hawkes* v. *Saunders* (2): *Trueman* v. *Fenton* (3); *Rimini* v. *Van Praagh* (4); *Wennall* v. *Adney*. (5)]

*Ridley*, in reply.

LORD COLERIDGE, C.J. The reply raises two points. The first is, that the plaintiffs had no notice of the liquidation proceedings, and the debt was not inserted in the list of creditors, and consequently that, as against the plaintiffs, the order of discharge has no effect. The answer suggested to this point is, that the 127th section of the Bankruptcy Act, 1869, provides that the registration by the registrar of a special resolution of the creditors on the occasion of a liquidation by arrangement shall, in the absence of fraud, be conclusive evidence that such resolution was duly passed and all the requisitions of the Act in respect of such resolution complied with. One of such requisitions is the production of a list of creditors. Primâ facie, the words of this section seem irresistible. Our attention, however, has been called by the plaintiffs' counsel to the provisions of the 126th section of the Act, which applies to compositions. Among those provisions there is no doubt an express enactment that the provisions of the composition shall only be binding on the creditors whose names appear in the statement of the debtor. But there are no such words in the section with regard to liquidation by arrangement. The probable reason for this difference has already been suggested. It may well have been that, when the legislature

(1) 1 H. & C. 703; 32 L. J. (Ex.) 265.
(2) 1 Cowp. 289.
(3) 2 Cowp. 544.
(4) Law Rep. 8 Q. B. 1.
(5) 3 B. & P. 247, 249.

was making an enactment by which persons were to be compelled by the vote of a majority to accept of less than they would otherwise have been entitled to, it was thought, in the case of an enactment so stringent, especial provision should be made for securing due notice to the persons so to be affected. Liquidation proceedings, on the other hand, are substantially similar to those in bankruptcy, and the creditors under such proceedings get neither more nor less than creditors in bankruptcy. Consequently, it may well have been thought that no other provisions were necessary in the case of such proceedings for the protection of the creditors' rights than the ordinary provisions relating to bankruptcy. I am, therefore, of opinion that, in the absence of fraud, the 127th section prevents such facts as are stated in this reply from being any answer to the defence that the debtor has been discharged under the proceedings for liquidation.

The second point raised by the reply is, that there was a subsequent promise to pay the debt. Our decision as to this must depend on the 49th section of the Bankruptcy Act, 1869. It is not denied that this was a debt from which, under that section, the order of discharge released the bankrupt. The question is, whether the subsequent promise could revive it. The argument of the plaintiffs' counsel was this. From Lord Mansfield's time down to Baron Parke's it was held that where there was a legal right the remedy for which was barred, though the right continued to exist, as in the case of debts the remedy for which was barred by bankruptcy or the Statute of Limitations, the moral obligation arising from such existing right formed a sufficient consideration to support a promise, and so the debt might be revived by a subsequent promise of the debtor to pay it. I do not stay to examine the reasoning upon which such decisions were based, it is sufficient that they exist, and I have no wish to cast any doubt on them. It is said that this being the state of the law prior to 6 Geo. 4, c. 16, express provision has been made with regard to this kind of debt in all the enactments since then until the Act of 1869. In the Act 6 Geo. 4, c. 16, s. 131, it was provided that no such promise should be of any avail to revive the debt, unless it was in writing. In subsequent statutes there have been provisions that even a promise in writing should be insufficient to revive

1876

HEATHER v. WEBB.

the debt. That state of things continued up to 32 & 33 Vict. c. 71, the present Act. At the time when that Act was passed, the former Acts with regard to bankruptcy were repealed by another Act, viz., 32 & 33 Vict. c. 83, which was passed on the same day. The 49th section of the Bankruptcy Act, 1869, provides that the order of discharge shall release the bankrupt from all debts provable under the bankruptcy, with certain exceptions, and "in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this act and the special matter in evidence."

There is, however, no provision in the Act similar to those contained in the former Acts with respect to the revival of debts barred by bankruptcy. The argument is, that because the Act is silent on this matter, therefore the debtor is remitted to the position in which he stood before 6 Geo. 4, c. 16, and the whole policy of the bankruptcy law since that Act has been absolutely reversed. That would be a startling conclusion. It must be observed, however, that the words of the present Act with regard to the effect of the order of discharge are not similar to those of the prior Acts.

The words of the 126th section of 6 Geo. 4, c. 16, are that "any bankrupt who shall, after his certificate shall have been allowed, be arrested or have any action brought against him for any debt, claim, or demand hereby made provable under the commission against such bankrupt, shall be discharged on common bail and may plead in general that the cause of action occurred before he became bankrupt and may give this Act and the special matter in evidence." I will not go through the corresponding sections of the subsequent Acts, because the language, though not identical, is substantially similar. The effect of them is, that where an action is brought for a debt provable under the bankruptcy, the defendant may plead that the cause of action accrued before bankruptcy. These are not the terms of the 49th section. The words of that section are "any proceedings in respect of any debt from which he is released by such order." The plaintiffs' counsel was driven to say that this was not only not an action

brought for the old debt, but not a proceeding in respect of the old debt. But the claim is in respect of work and labour done in 1873, before the bankruptcy proceedings. The defence is to that claim, and the reply is to that defence. It is in vain to say that this is not a proceeding in respect of a debt provable under the liquidation, and which was discharged by the order of discharge.

The matter is somewhat bare of authority. But we have been referred to a judgment of Bacon, V.C., than whom there is no greater living authority on the subject of bankruptcy, in the case of *Jones* v. *Phelps*. (1) It is true that the case differed somewhat from this, inasmuch as it turned on the question whether the law previous to the present Act was applicable or the present law, but the Vice-Chancellor seems to have decided on the wider ground that, under the Act of 1869, a promise to pay a debt barred by bankruptcy was nudum pactum, as there was no consideration for it. Such authority, therefore, as there is is in favour of the view we take.

The present Act in its general scope was obviously intended to make bankruptcy proceedings more completely effect the object of winding up a man's previous liabilities and giving him an altogether fresh start. I am not prepared to hold that, as it were by a side wind, and by reason of the omission of particular provisions with regard to the effect of such promises as these, the Act has reversed the whole course of legislative policy on this subject since 6 Geo. 4, c. 16. It therefore appears to me, both on the reason of the thing and such authority as there is, the reply is bad and our judgment must be for the defendant.

LINDLEY, J. I am of the same opinion. With regard to the first point, primâ facie it might not be unreasonable to suppose that where a creditor was omitted from the list of creditors and had no notice of the liquidation proceedings, he might be exempted from the effect of them, but when we look further and see that the effect of the order of discharge in liquidation proceedings is the same as that of the order of discharge in bankruptcy, and that in bankruptcy a creditor may be bound though his name is omitted from the list, it is impossible not to hold that the certificate of

(1) 20 W. R. 92.

1876

HEATHER v. WEBB.

discharge is as conclusive in the case of proceedings by liquidation as in the case of bankruptcy.

With regard to the second point, our decision on that must depend on s. 49. The plaintiffs' counsel argued that on general principles of law apart from statutory provisions a promise to pay a debt, the remedy for which had become barred, was supported by such antecedent debt, which formed a sufficient consideration. I do not dispute that proposition, though I confess I cannot quite follow the reasoning on which it is based. It may be admitted that in general where the remedy only is barred, the debtor may revive the debt by an express promise. But we have to look to the particular enactments of the Bankruptcy Act to see how far this doctrine applies in the case of bankruptcy. The plaintiffs' counsel argues that the effect of the omission in the present Act of the special provisions with regard to promises to pay debts barred by bankruptcy that were contained in former Acts, is that the general proposition above referred to applies, and the law is altered in the plaintiffs' favour. To that argument I cannot accede. The provisions of the present Act by which many liabilities are made provable under the bankruptcy which formerly were not provable, shew that the intention is that the bankrupt shall be more completely discharged from his liabilities than under previous Acts. It seems to me that, regard being paid to the obvious intention of the Act in this respect, it could not have been intended so to alter the law that a subsequent promise should revive the bankrupt's antecedent debts. The general policy of the present law is much more strongly against such a revival of liability than in previous Acts. The section of the Act that relates to the discharge of the bankrupt is the 49th. I agree with what my Lord has said with regard to the language of that section. It seems to me impossible to say that the present action is not a proceeding "in respect of" a debt from which the defendant was released by the order of discharge. The plaintiffs' counsel contends that the defendant cannot plead in the language of the section that the cause of action occurred before his discharge, because the cause of action here is the breach of the subsequent promise to pay. This is no doubt a plausible way of putting the case, but whether it is correct depends on the meaning of the term "cause of action." The only

1876

HEATHER v. WEBB.

cause of action mentioned in the writ of summons and the claim is clearly the old debt which accrued before the bankruptcy proceedings. This perhaps is a technicality, and might be met by an amendment, but I am of opinion that no amendment would make the case any better for the plaintiffs. It seems to me that the sense in which the term "cause of action" is used in the statute must include cases where so much of the cause of action as constitutes the consideration for the promise has occurred before the discharge. There does not seem to be any decision expressly in point on the facts of the present case, but in the case of *Jones* v. *Phelps* (1) Bacon, V.C., appears to have considered this question and to have taken the same view as we now take. For these reasons I think our judgment must be for the defendant.

*Judgment for the defendant.*

Solicitors for plaintiffs: *Heather & Son.*
Solicitors for defendant: *Worthington, Evans, & Cook.*

---

RICHARDSON *v.* ELMIT.

THE METROPOLITAN BOARD OF WORKS, GARNISHEES.

*Nov.* 3.

*Practice—Attachment under Order XLV, Rule* 2—*Debt "owing or accruing"—Notice to treat, under Lands Clauses Consolidation Act*, 1845, 8 & 9 *Vict. c.* 18.

A mere notice to treat, upon which nothing has been done, does not constitute "a debt owing or accruing," which can be attached under Order XLV, Rule 2, of the Judicature Act, 1875.

THE following order was made by Huddleston, J., on the 27th of October last:—

"Upon hearing the solicitor or agent for the judgment-creditor, and upon reading the affidavit of M. D. O., I do order that all debts owing or accruing from the garnishees to the judgment-debtor be attached to answer a judgment recovered against the said judgment-debtor by the judgment-creditor in the Common Pleas Division of the High Court of Justice on the 11th January,

(1) 20 W. R. 92.

1876

RICHARDSON v. ELMIT.

1876, for 94*l.* 10*s.* 6*d.*, and upon which judgment the sum of 91*l.* 15*s.* 6*d.* and interest at 4 per cent. per annum from the 11th of January, 1876, remains due and unpaid: And I further order that the garnishees and the judgment-debtor, their solicitor or agent, attend in the Common Pleas Division of the High Court of Justice at Westminster on Friday the 3rd of November, 1876, at 11 of the clock in the forenoon, to shew cause why the said garnishees should not pay the said judgment-creditor the debt due from them to the said judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt."

The order was founded upon an affidavit as follows,—

1. On the 11th of May last, the plaintiff recovered a judgment of this Court in this action against the above-named defendant for 80*l.* 16*s.* 6*d.* and 13*l.* 14*s.* for costs.

2. The said judgment is still unsatisfied to the amount of 91*l.* 15*s.* 6*d.*, and interest thereon at 4 per cent. per annum from the 11th of January last.

3. The Metropolitan Board of Works, of Spring Gardens, are or will be indebted to the defendant in a sum of money for compensation in respect of certain premises required by them at 9, St. John's Square, Clerkenwell, in respect of which the said Metropolitan Board of Works have given the defendant notice to treat, as I am informed and verily believe.

4. The said Metropolitan Board of Works are within the jurisdiction of this Court.

*Biron*, for the garnishees, shewed cause. The order in question is founded upon Rule 2 of Order XLV, which provides that "the Court or a judge may, upon the ex parte application of such judgment-creditor, either before or after such oral examination (1), and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that

(1) See Rule 1.

the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to shew cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt." This affidavit does not shew "a *debt* owing or accruing" from the garnishees to the judgment-debtor, but merely a claim which may or may not result in a debt. Although a notice to treat has been given, it does not follow that the party will make out a title.

*K. Digby,* for the judgment-creditor. The company having given notice to treat for the debtor's interest in the premises, a debt is created, though unascertained as to amount. It has been held that such a notice creates the relation of vendor and purchaser. In *Stone* v. *Commercial Ry. Co.* (1), Lord Cottenham, C., says: "The moment the company have given the notice, the relative situation of vendors and purchasers is constituted between the parties, and the value of the property, if the parties cannot agree, is to be ascertained by reference to a jury." And in *Waller* v. *Eastern Counties Ry. Co.* (2), Shadwell, V.C., said: "After the notice, the only thing to be ascertained is the amount of the purchase-money, and, as the mode of ascertaining that is prescribed by the statute, it is in contemplation of law *certain*, though it remains to be ascertained."

[DENMAN, J. The same might be said of a claim for unliquidated damages, which may by process of law be rendered certain.

GROVE, J. All that those cases shew is, that the company cannot repudiate the transaction after notice to treat.]

Whatever the compensation may be, it must result in a debt, and therefore is liable to attachment. It was so held, under s. 61 of the Common Law Procedure Act, 1854, in *Tapp* v. *Jones.* (3) It is not necessary to wait until the amount of the debt has been ascertained or the debt has become actually due and payable. The notice to treat creates a statutory contract which must result in a debt.

GROVE, J. I am of opinion that the order should be discharged.

(1) 4 M. & Cr. 122; 1 Ry. Cas. 375. (2) 6 Hare, 600.
(3) Law Rep. 10 Q. B. 591.

1876

RICHARDSON v. ELMIT.

This case has been very ingeniously argued by Mr. K. Digby; but it amounts only to this,—a notice to treat has been served upon the judgment-debtor by the Metropolitan Board of Works. The equity cases cited go to shew that that amounts to a contract between the parties which creates the relation of vendor and purchaser, from which the Metropolitan Board of Works cannot withdraw. But, for the purpose of the proceeding now before us, the Court must be satisfied that there is a debt actually owing or accruing. Upon the face of this affidavit I can see nothing that we can order to be attached. There is no debt which is either owing or accruing: there is a mere surmise that in an event which may or may not happen a debt may become due from the Metropolitan Board of Works to the judgment-debtor. It is impossible at present to say what may be the result of the notice to treat. It may turn out that the party to whom the notice has been given has no interest whatever in the premises, in respect of which he can be entitled to compensation. It clearly is not a debt owing or accruing, within the meaning of the rule.

DENMAN, J. I am of the same opinion, upon the ground that the affidavit on which the order was granted does not shew "a debt owing or accruing," within the meaning of Order XLV, Rule 2. All it does shew is, that at some time or other something may become due from the Metropolitan Board of Works to the judgment-debtor. It is like a claim for unliquidated damages, and nothing that can be accurately described as a debt.

*Order discharged.*

Solicitors for judgment-creditor: *Field, Roscoe, Field, Francis, & Osbaldeston.*

Solicitor for garnishees: *W. Wyke Smith.*

## ELLIS *v.* THE MANCHESTER CARRIAGE COMPANY, LIMITED.

1876
*Nov.* 6.

*Prescription Act*, 2 & 3 *Wm.* 4, *c.* 71, *s.* 3—*Obstruction of Lights—Conveyance of adjoining Premises without Reservation of Easement.*

Upon a general conveyance of land, there is no implied grant, by the purchaser, of the easement of light necessary for the enjoyment of an adjacent house of the vendor.

In 1867, the plaintiff bought houses in Manchester the backs of which abutted on a street or way on the opposite side of which were certain cottages. In 1868 he purchased these cottages, but by a different title. Both sets of premises had existed in their then state for more than twenty years. In 1870, the plaintiff sold the cottages to one D., and ultimately D.'s interest therein became vested in the defendants, who pulled down the cottages and erected a large building upon the site of them and also upon a portion of the intervening street or way, and so obstructed the light to the plaintiff's windows. The conveyance to D. contained no reservation of any easement to the plaintiff's houses; and it professed to convey the land up to the back wall of the plaintiff's premises:—

*Held*, that, notwithstanding the plaintiff's houses had acquired an "absolute and indefeasible" right to light at the time of the conveyance of the cottages to D., inasmuch as that conveyance was without reservation the defendants were guilty of no wrongful obstruction of the plaintiff's lights.

12 CLD 35
37, 43, 6
4 QBD 497
498

Action by a reversioner for obstruction of ancient lights.

The cause was tried before Ambrose, Q.C., at the last summer assizes at Manchester. The facts were as follows:—The plaintiff in 1867 purchased nine houses and shops in Rochdale Road, Manchester, which abutted at the rear upon a street called Hewitt Street. At the time he acquired these houses, they were more than twenty years old. In 1868, the plaintiff purchased eighteen cottages in Hewitt Street overlooking the backs of the nine houses, but with a way,—(whether public or private there was no evidence to shew)—between them. The two properties were bought at different times and by distinct titles. In 1870, the plaintiff sold the eighteen cottages to one Done, the conveyance to him containing no reservation of the ancient lights of the nine houses in Rochdale Road. Eventually the defendants became possessed of Done's interest in the eighteen cottages, pulled them down, and erected on their site and also partly on the site of the road or space between them and the plaintiff's premises a large building for stabling, &c. This building admittedly obstructed or lessened the lights of the plaintiff's premises. The conveyance to

1876

ELLIS v. MANCHESTER CARRIAGE COMPANY.

Done professed to grant the whole of the land upon which the eighteen cottages were built and up to the plaintiff's back wall, including the space then unbuilt upon (as is usual at Manchester), but which was not described therein as a public street or way.

For the defendants it was contended, upon the authority of *White* v. *Bass* (1), that, Done's conveyance containing no reservation of any easement of light to the plaintiff's premises, they were justified in building to the verge of the land so conveyed, without regard to any supposed rights of the plaintiff.

For the plaintiff it was insisted that, his right to the easement of light to the back windows having become absolute and indefeasible before he became possessed of the eighteen cottages, he could not be deprived of that right by the form of the conveyance of the latter to Done.

The learned commissioner overruling this contention, the plaintiff's counsel asked leave to amend his claim by adding a count for the obstruction of the way. But this the commissioner declined to allow.

Judgment was thereupon entered for the defendants, leave being reserved to the plaintiff to move to enter judgment for him,—the question of damages in that case to be referred.

*Jordan* moved accordingly. This case must be governed by *Frewen* v. *Phillips*. (2) There, the plaintiff and defendant occupied houses adjoining each other, as tenants under leases both of which were granted on the same day, viz. the 18th of December, 1780, and both expiring at the same time. The defendant by building on his own premises obstructed a window of the house of the plaintiff, though the latter had had uninterrupted enjoyment of the light and air for more than twenty years: and it was held that the circumstance of the houses having been held under the same landlord and for the same term did not prevent the one tenant from acquiring an indefeasible right to light as against the other. In delivering judgment the Lord Chief Baron adopts the following dictum of Cresswell, J., in *Truscott* v. *Merchant Taylors' Co.* (3): "The 3rd section of the Prescription Act (2 & 3 Wm. 4,

(1) 7 H. & N. 722; 31 L. J. (Ex.) 283. 8 Jur. N.S. 312

(2) 11 C. B. (N.S.) 449; 30 L. J. (C.P.) 356. 7 Jur. N.S. 1246

(3) 11 Ex. 863. 2 Jur. N.S. 356-7

c. 71) does not say, 'when the access and use of light shall be enjoyed *as of right*,' because every person has a right to so much light as can come in at his windows. It is true that his neighbour has a right thus far, that within twenty years he may build upon his own land and obstruct the access of light: he does no wrong, for, within the period of limitation, the other party has no right to have his windows unobstructed. The Prescription Act brought this to a simple question. It says that, after twenty years' enjoyment without interruption, the right shall be deemed *absolute and indefeasible*. But it is not so, if another person has a right to obstruct the light." Here, the plaintiff had an absolute and indefeasible right to the unobstructed access of light to his premises in Rochdale Road before he became the owner of the cottages in Hewitt Street. The case of *White* v. *Bass* (1), upon which the defendants relied at the trial, raised a totally different question. There, the house and land had been occupied together for more than fifty years; and then the owner sold the land, reserving to himself no right to the light in the house. No easement had been acquired, as here.

[DENMAN, J. In the case of *White* v. *Bass* (1), Channell, B., adopts the dictum of Lord Holt in *Tenant* v. *Goldwin* (2), which is quite conclusive on the subject. And see *Curriers' Co.* v. *Corbett*. (3)]

Then, the defendants have by their building obstructed a way, which, be it public or private, they had no right to do.

[GROVE, J. The plaintiff cannot support a complaint of the obstruction of access of light to his premises by shewing an obstruction of a right of way.]

Done took the conveyance of the cottages subject to the right of public way. He could not be allowed to justify a private wrong by a public wrong.

[GROVE, J. We cannot assume that this was a public street: it is not so described in the deed. Besides, the plaintiff did not so shape his complaint; and I think the learned commissioner was quite right in refusing to allow the plaintiff to amend.]

GROVE, J. I am of opinion that there should be no order. I

(1) 7 H. & N. 722; 31 L. J. (Ex.) 283.

(2) 2 Ld. Raym. 1093.

(3) 2 Dr. & Sm. 355.

1876

ELLIS v. MANCHESTER CARRIAGE COMPANY.

think we are bound by the decision of Kindersley, V.C., in *Curriers' Company* v. *Corbett*. (1) That case is on all fours with this, save that this was the case of a street or road. When the owner of a house sells a piece of adjoining land, without reserving any rights, the purchaser may use it for any purpose to which land may be applied. No evidence seems to have been given that the street in the rear of the plaintiff's houses was a public street. If this had been an action for encroaching on or obstructing a public way, such evidence might have been important. Here, however, the action is for the obstruction of private lights. For the purpose of such an action, whether the alleged right of way was a public or a private one was wholly immaterial. The amendment asked was, I think, properly refused: it would have introduced an entirely different case from that which the defendants came prepared to meet. So far as the lights were concerned, the defendants had a clear right to obstruct them.

DENMAN, J. I am entirely of the same opinion. So long ago as the case of *Tenant* v. *Goldwin* (2) Lord Holt said: "If the builder of the house sells the house with the appurtenances, he cannot build upon the remainder of the ground or so near as to stop the lights of the house: and, as he cannot do it, so neither can his vendee. But, if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But, in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." That is the dictum of a very learned judge. In *White* v. *Bass* (3) it was held that, on a general conveyance of land, there is no implied grant by the purchaser of the easement of light necessary for the enjoyment of an adjacent house of the vendor. Channell, B., in his judgment, adopts the above dictum of Lord Holt, and says: "The argument for the plaintiff has dwelt a great deal upon the case of *Palmer* v. *Fletcher* (4), but that case is explained in *Tenant* v. *Goldwin* (2) by Lord Holt, who said, &c. I think that is the true view of the

(1) 2 Dr. & Sm. 355.
(2) 2 Ld. Raym. 1089, 1093.
(3) 7 H. & N. 722; 31 L. J. (Ex.) 283.
(4) 2 Lev. 122; 1 Sid. 167, 227.

case; and it does not conflict with any of the authorities cited." The same law is laid down in *Curriers' Company* v. *Corbett.* (1) It was there held that, where the owner of a house sells a piece of adjoining land, the purchaser may build on it as he pleases, and the vendor cannot prevent his doing so, even though the buildings erected on it may interfere with his ancient lights. Kindersley, V.C., in his judgment says: "It has been determined that, if a person, having a house on his land the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect any buildings he pleases upon the land so sold to him, however much they may interfere with the light coming to the windows of the vendor's house. (2) That seems clearly to be the law, though it must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice." There is no issue here upon the public road: we are not, therefore, at liberty to speculate upon what would have been the result if the defendants had shut up or obstructed a right of way. It is simply the case of a man parting with property without a reservation of the right of light to his adjoining premises. I think there should be no order.

*Order refused.*

Solicitors for plaintiff: *Chester, Urquhart, Mayhew, & Holden, for J. K. McEwen, Manchester.*

(1) 2 Dr. & Sm. 355. 11 Jur. N.S. 719.

(2) See the qualification of Lord Holt in *Tenant* v. *Goldwin* (2 Ld. Raym. at p. 1093), that the conveyance is without reservation.

1876
*Nov.* 9.

FOSTER *v.* PARKER.

*Bill of Exchange—Indorser—Notice of Dishonour.*

2 Q B D. 25

To a statement of defence, in an action against an indorser of a bill of exchange, setting up the absence of notice of dishonour, the plaintiff replied that neither at the time when the bill was drawn, nor afterwards, nor when it became due and on presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant, any effects of the defendant in his hands, and the said bill was drawn and accepted and endorsed by the defendant and the prior indorsers for the purpose of raising money for the defendant, the drawer, the acceptor, and the prior indorsers jointly, and the defendant was in no way damnified, even if there was no notice of dishonour :—

*Held*, a bad reply.

ACTION on a bill of exchange by an indorsee against an indorser.

Statement of defence relied on the want of notice of dishonour.

Reply : that neither at the time when the bill was drawn, nor afterwards, nor when it became due and on presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant any effects of the defendant in his hands, and the said bill was drawn by the drawer and accepted by the acceptor and indorsed by the defendant and by the prior indorsers for the purpose of raising money for the defendant, the drawer, the acceptor, and the said persons who indorsed before the defendant jointly, and the defendant was in no way damnified, even if there was no notice of dishonour.

Demurrer and joinder.

*Holl* (*Morley* with him), for the defendant. The facts averred in the reply are not sufficient to excuse notice of dishonour. The utmost that can result from them is, that defendant would have to contribute his proportion to the payment of the bill, and if he paid the whole he would have his action for contribution against the other parties. To disentitle the indorser to notice of dishonour it must be clearly shewn that he could have no reason to expect that any one else would provide for the bill. But here it is quite consistent with what is alleged, that the parties might intend that they should be come upon in the order in which they

stood on the bill. [He cited *Bickerdike* v. *Bollman* (1); *Carter* v. *Flower* (2); *Maltass* v. *Siddle.* (3)]

*R. V. Williams* (*Maurice Powell* with him), for the plaintiff. If the indorser is not merely a surety, as is usually the case, but is himself a principal and primarily liable, he cannot set up the absence of notice of dishonour. The true test is, whether he would have a remedy over against any other party upon the bill. In this case there might be an action for contribution by the defendant upon his paying the bill, but there would be no remedy over on the bill. There was no reason why one among all these persons who were jointly raising money should occupy the position of drawer, or acceptor, or indorser more than another. As between themselves they were all primarily liable. If the defendant had met the bill he could not have sued the acceptor, or drawer, or any of the prior indorsers upon the bill. He might have sued for contribution, and if he had done so, could he have been met by a plea of no notice of dishonour? If the defendant's contention is right, it would follow that he could. The defendant could not have expected that any one of the other parties would meet the bill rather than himself. [He cited *Corey* v. *Scott* (4); *Terry* v. *Parker* (5); *Wirth* v. *Austin* (6); *Carew* v. *Duckworth.* (7)]

*Holl*, in reply, was not called upon.

DENMAN, J. I am of opinion that our judgment should be for the defendant. I think the allegation in the reply that the defendant was in no way damnified by want of notice of dishonour must be treated as an allegation of law, a mere conclusion from the previous allegations. Then are those allegations sufficient to make the reply good? In the case of *Bickerdike* v. *Bollman* (1) it was held that no notice of dishonour was necessary, but in all of the subsequent cases on the subject it is laid down that the doctrine in that case ought not to be extended; and that, with regard to an indorser, to excuse notice of dishonour facts must be stated which shew, not as a mere possibility but as an absolute certainty, that he could not be damnified by the absence of such notice.

(1) 1 T. R. 405.
(2) 16 M. & W. 743.
(3) 6 C. B. (N.S.) 494.
(4) 3 B. & Ald. 619.
(5) 6 A. & E. 502.
(6) Law Rep. 10 C. P. 689.
(7) Law Rep. 4 Ex. 313.

1876

FOSTER v. PARKER.

The facts alleged in the reply only shew that the drawer, acceptor, and prior indorsers of the bill were jointly interested with the defendant in some transactions for the purposes of which the amount of the bill was to be raised. It seems to me that so far from these facts making out that the defendant could not be damnified by want of notice of dishonour, the primâ facie inference from them is that he would be. All the parties being interested jointly, primâ facie if the defendant had to pay the whole amount of the bill he would be entitled to contribution from the other parties. The authorities cited in argument all show that the principle of *Bickerdike* v. *Bollman* (1) cannot be extended to the case of an indorser, unless it is clearly made out that under no circumstance could he be prejudiced by absence of notice. The allegations in the reply do not make this out.

LINDLEY, J. To disentitle the defendant as the indorser of a bill of exchange to notice of dishonour the plaintiff must shew that it was the defendant's duty, as between himself and the other parties to the bill, to provide for it. It is obvious that the Court cannot come to the conclusion that the defendant was, as between himself and the other parties to this bill, bound to provide for it from the averments in this reply. Indeed, the primâ facie inference from them would be that he was not. The case therefore does not come within the authority of the cases in which notice of dishonour has been excused. With regard to the general allegation, that the defendant was not damnified by absence of notice of dishonour, it seems to me insufficient as being too vague. It might mean that the other parties to the bill would not have been able to pay. He would be damnified in the legal sense if he had a remedy over against any of them and was not bound as between himself and them to meet the bill. For these reasons I agree that our judgment should be for the defendant.

*Judgment for the defendant.* (2)

Solicitors for plaintiff: *Harper, Broad, & Battcock.*
Solicitor for defendant: *Stephens.*

(1) 1 T. R. 405.

(2) See *Turner* v. *Samson*, 2 Q. B. D. 23.

## CROM *v.* SAMUELS.

1876
Nov. 4.

*Practice—Appeal from Order of Judge at Chambers—Time for Appealing—Judicature Act*, 1875, *Order LIV., Rule* 6(1)

A judge at chambers having made an order on the 29th of August, the party affected by such order moved the Divisional Court to rescind it during the Michaelmas sittings within eight days from the commencement of such sittings:—

*Held*, that the application was too late, inasmuch as by the 6th Rule of Order LIV. an appeal from a judge at chambers must be within eight days from the decision appealed against.

Appeal against an order of Huddleston, B., made at chambers on the 29th of August last.

Judgment in the action had been signed for want of appearance and execution issued. An order had been obtained from a master at chambers setting aside the judgment and writ of execution for irregularity. This order had been rescinded by the order of Huddleston, B.

*Lanyon*, for the defendant, moved to rescind the order of Huddleston, B.

*Murphy, Q.C.*, for the plaintiff, objected that the appeal was not in time, the 6th Rule of Order LIV. providing that appeals from orders at chambers to the Court must be within eight days. He contended that the defendant should have applied for an extension of time for appealing under Order LVII., Rule 6, or that he might have applied to the Divisional Court sitting during the long vacation.

*Lanyon*, in reply, contended that the matter was not an application that required to be immediately or promptly heard within the meaning of the Judicature Act, 1873, s. 28; that no appeal could have been made to the Divisional Court in Long Vacation, inasmuch as Huddleston, B., who had made the order, was one of the two vacation judges, and so could not hear the appeal; that the appeal therefore could not have been dealt with by the Court in the vacation, and that it was the obvious intention of the rules that the Long Vacation, during which no Court was sitting for general purposes, should not be counted in the computation of the

(1) See

1876

CROM v. SAMUELS.

periods of time for taking any step. [He cited *Hallams* v. *Hills*. (1)]

GROVE, J. The objection made to this application is that it is too late. By the 6th section of Order LIV. it is provided that in the Queen's Bench, Common Pleas, and Exchequer Division, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against. To that rule there is no qualification. There are no such words in the order as those which, as I understand the case, occasioned the discussion in *Hallams* v. *Hills*. (1) It appears to me that we should be legislating for ourselves, and not merely interpreting the rule, if we introduced any qualification. It may be that the legislature thought that there was very good reason why appeals from decisions at chambers should always be speedy, the matters there decided being matters generally calling for summary decision. If the eight days' limit only applied where the Divisional Courts were sitting regularly after the vacation, it might have the effect of suspending final judgment on matters calling for summary decision during the whole of the Long Vacation. There is a remedy for any hardship which might be occasioned by this rule if it stood alone. Where the justice of the case requires it, by the 6th section of Order LVII. a Court or a judge has power to enlarge the time appointed by the rules or fixed by any order enlarging time for doing any act or taking any proceeding. If there is no means of applying during the vacation, and no Court is sitting, a remedy may be applied, where the justice of the case requires it, under that order. There is this further consideration. During the vacation a Divisional Court did sit, but it is said that that Court could only take business of an urgent nature, and that this matter was not of such a nature, and therefore the appeal can now be made to this Court. If this line of argument were well founded, it would leave it to the opinion of the Divisional Court sitting after the Long Vacation whether the particular matter was or was not so urgent that the appeal ought to have been to the Vacation Court, and the 6th section of Order LIV., instead of being peremptory,

(1) 24 W. R. 956.

as its terms naturally import, would be rendered most elastic and uncertain in its operation, as its effect would depend in every case upon the opinion of the Divisional Court after the vacation whether the matter was urgent or not. The words of the order are peremptory and without ambiguity, and I cannot think that it was intended that they should be subject to any such qualification. There is an ample remedy for any hardship that might be occasioned by our construction of the rule. The party aggrieved may come to the Court and apply for an enlargement of the time. In this case the Court is ready to enlarge the time on what it considers reasonable terms, but the counsel for the defendant is not willing to accept those terms. The application must therefore be refused.

DENMAN, J. The 6th section of Order LIV. is peremptory and unambiguous in its terms. No sufficient ground has, in my opinion, been brought before us for qualifying in any way the natural meaning of its terms. The case of *Hallams* v. *Hills* (1) is not really any authority for the present case, for the decision there turned on totally different words. The words of the rule there in question obviously contemplated a varying state of things, while these are absolute. I do not think it necessary to decide at present what was the proper course in such a case as this for the applicant to have taken during the Long Vacation. There may be a difficulty with respect to a judge sitting on appeal in the vacation from his own decision. The words of the order are peremptory, and whether the appeal could or could not be to the Vacation Court seems to me immaterial. It is argued that the legislature could not have intended so great a hardship as it is alleged arises from this view. I do not see any such hardship. In former times the decisions of judges at chambers out of term were often practically without appeal with respect to many interlocutory proceedings. The present enactments to a great extent mitigate this hardship, but it may well be that they do not give a complete remedy, and that it was not intended that they should give an appeal in all cases. I can see no reason for

(1) 24 W. R. 956.

1876

CROM v. SAMUELS.

departing from the plain meaning of the words in the 6th section of Order LIV. Again, if there were any hardship, it seems to me that an ample remedy is provided by the 6th section of Order LVII. Under that section the Court may at any time do what the justice of the case requires. I therefore agree that this appeal is too late.

*Application refused.*

Solicitors for plaintiff: *Summerlin & Heritage.*
Solicitor for defendant: *J. S. Salaman.*

---

*Nov.* 4.

CASEY *v.* ARNOTT.

*Practice—Service of Writ out of the Jurisdiction—Slander of Title—Judicature Act*, 1875, *Order XI.*

5 C.D. 4.

A statement in the nature of slander of title, made out of the jurisdiction concerning property within the jurisdiction, is not an act or thing affecting such property within the meaning of Order XI., and consequently service of a writ in an action for such statement cannot be allowed out of the jurisdiction.

APPLICATION for leave to serve a writ out of the jurisdiction in Ireland, which had been referred by Lindley, J., to the Court. The action was in the nature of slander of title, being brought by the owner of a ship in respect of statements made by the defendant in Ireland concerning the ship, which was in England, imputing unseaworthiness to the ship, in consequence of which the crew refused to proceed to sea in her, and a negotiation for the sale of her fell through.

*French*, for the plaintiff, contended that the case came within the terms of the Judicature Act, 1875, Order XI., by which service out of the jurisdiction may be allowed whenever the whole or any part of the subject-matter of the action is land, or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property.

GROVE, J. Our decision in this case must turn on the meaning

(1) See W.N. (1875) 164 II 346

of Order XI. That order provides that service of a writ out of the jurisdiction may be allowed whenever the whole or any part of the subject-matter of the action is land, or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property. I do not think that this case is within the meaning of those words. I do not think that the property can be affected within the meaning of the order by mere words spoken about it. The words seem to me to point to some effect directly produced upon the thing itself, as when it is physically affected, or the property in it is affected. In this case mere statements were made about the thing that affected its value in the hands of the owners. It was not the thing itself that was affected, but the minds of intending purchasers.

DENMAN, J. I am of the same opinion. In one sense there was here an act or thing affecting the property in question, but I do not think, looking to the context, that such an affecting as this was intended to be within the order. It seems to me, having regard to the subsequent part of the order, that the species of actions intended to be included were actions relating to contracts, and actions for matters directly affecting property, and not such actions as slander of title where property is not directly affected.

*Application refused.*

Solicitors for plaintiff: *Argles & Rawlins.*

1876
*Nov.* 18.

[REGISTRATION CASES.*]

HARRISON, APPELLANT; CARTER, RESPONDENT.
COOK'S CASE. PORT'S CASE.

*Parliament—Borough Vote—Alms which by the Law of Parliament disqualify from voting—2 Wm. 4, c. 45, s. 36.*

The word "alms" in s. 36 of the Reform Act, 2 Wm. 4, c. 45, is not confined to parochial donations or sums distributed by the overseers other than from the funds collected for the poor-rates, but may include moneys distributed annually from the income of a private charitable trust bequeathed by an individual for the use of the poor inhabitants of a parish.

What "receipt of alms" will constitute such a state of absolute indigence and dependence as to work a disqualification "by the law of Parliament" to be registered as a voter, must depend upon the circumstances of each particular case.

Lands were devised to trustees and their heirs, upon trust to apply the rents, &c., for the putting forth and placing abroad of poor children of the tything of W., the surplus to be distributed unto "*the poorest inhabitants of the said tything*, as my said trustees and their assigns shall think fit." The surplus usually amounted to 40*l.*, which was distributed once a year amongst about eighty of the labouring population of W., according to the discretion of the trustees, and without solicitation, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family.

C. and P., who in other respects were entitled to be registered, had within the electoral year each received a donation of 12*s.* 6*d.* from this charity. Neither had received parochial relief within the year. Both were agricultural labourers with large families, and both were found by the revising barrister to be "proper recipients of the charity:"—

*Held*, that this was a receipt of "alms" which by the law of Parliament disqualified the parties from being registered as voters.

APPEAL from the revising barrister for the borough of Petersfield.

John Cook, who was on the list of voters as an inhabitant householder in the parish of Burton, was objected to as not being duly qualified, inasmuch as it was alleged that he had within twelve months next previous to the last day of July in the present year received alms which by the law of Parliament disqualified him from voting in the election of a member to serve in Parliament. The facts upon which this objection was founded are the following:—

In the year 1664, one John Goodger by his will left certain

* For convenience of reference, the Registration Cases for this year are collected here.

funds for charitable purposes. The only portion of such will necessary for the consideration of the case is as follows:—

I give and devise unto my honored friend Leonard Bilson, Esq., and my nephew Edmund Yalden, in the county of Surrey, clerk, and his heirs and assigns for ever, all my messuage, dwelling-house, together with all barns, stables, outhouses, and buildings, and all the gardens and orchards thereunto belonging, situate in Weston aforesaid, called Half-penny land, now in the possession of Thomas Jacques, together with the free liberty to water and overflow the said lands as it is now and heretofore hath been used for the best improvement thereof, to the intent and purpose that the said Leonard Bilson and Edmund Yalden and the survivor of them, their heirs and assigns, shall grant and convey all the said messuage, land, and premises, with the appurtenances, unto six able, honest, and sufficient persons, their heirs and assigns, as they or the survivor of them shall think fit, Upon trust and confidence, and to the intent and purpose that all the yearly rents, issues, and profits of the said messuage, land, and premises shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the tything of Weston aforesaid; and the overplus thereof shall be distributed unto the poorest inhabitants of the said tything of Weston aforesaid as my said trustees and their assigns shall think fit.

The overplus, after making payments for education, apprenticeship-fees, and sundry expenses, generally amounts to about 40*l.*, which sum is distributed once in each year (generally in the spring) by the trustees amongst about eighty of the laboring population of the tything of Weston, in the parish of Weston, according to their discretion, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family.

Personal application is not made to the trustees, who make inquiry, by themselves or their agents, into the circumstances of the inhabitants of the tything of Weston, and they decide who are fitting persons to receive and who shall receive a grant from the charity, and of what amount that grant shall be.

The money was distributed on the 10th of January in the present year; and John Cook then received 12*s.* 6*d.*, the largest sum granted.

John Cook, who is an agricultural laborer, is a married man, with five children, and has from time to time applied for and received parochial relief. He was omitted from the list of voters for the year 1874-5 on the ground of receipt of parochial relief; but he received no such relief in the electoral year which expired on the 31st of July last.

1876

HARRISON v. CARTER.

Previously to the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), John Cook was not entitled to exercise the parliamentary franchise, the house which he then occupied and now occupies being of insufficient value to confer a qualification under the Reform Act of 1832 (2 Wm. 4, c. 45), and he being not otherwise qualified.

John Cook was a proper recipient of the charity.

The Court was to be at liberty to draw inferences of fact.

Upon objection taken that this was a receipt of alms which incapacitated John Cook, the revising barrister decided that it was not such a receipt, and retained the name on the list.

The question for the Court was, whether or not he did right in retaining the name of Cook on the list of voters.

The case of Edmund Port, whose name was also retained on the same list of voters, subject to the same objection as in Cook's case, was in all respects save one the same as the above. As to Edmund Port, the only variation in the statement was, that he is an agricultural labourer, and a married man with four children. He on one occasion, viz. in the year 1873, applied for parochial relief, which was refused by the board of guardians, who were of opinion that he did not need it.

*Arbuthnot*, for the appellants. These cases turn upon s. 36 of the Reform Act, 2 Wm. 4, c. 45, which enacts that no person shall be entitled to be registered in any year as a voter in the election of a member of Parliament for any city or borough, "who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament:" and the question is whether the acceptance of a voluntary donation from the trustees of this charity was a receipt of alms which, at the time of the passing of that Act, "by the law of Parliament" disqualified the recipient from voting. In order to ascertain what amounted to such a disqualification, resort must be had to the decisions of election committees. This question was raised but not decided in *Stowe* v. *Jolliffe*. (1) This receipt of parochial relief was a common-

(1) Law Rep. 9 C. P. 734.

law disqualification, on the ground that very poor and indigent persons were incapable of exercising an independent judgment of their own. The objects of this charity are to be "the poorest inhabitants of the tything;" and the cases find that the persons objected to were "proper recipients of the charity," that is, that they were among the poorest inhabitants of the tything. The reason for the rule is thus stated in Rogers on Elections, 12th ed. p. 210,—"Persons who are or have been within a certain time obliged to depend, wholly or in part, on eleemosynary assistance have been held by Whitelocke and other writers to be disqualified by the common law, not only because from their indigence they were unable to contribute to the wages of their members, but because from their dependent situation their voices were no longer free. But the receipt of alms was only considered as evidence of inability, which evidence might be rebutted by circumstances; and the franchise was considered as suspended, not annihilated." At pp. 213, 214, where the decisions of committees are collected, it is said: "In many of the old boroughs the usage of the place and the decisions of the House or committees have determined the point, as appears by the following cases,—*Aylesbury* (1): B. devised lands for the repair of highways and for alms to the blind, sick, and lame, to be distributed in small sums annually. It commonly continued to the same persons for their lives, but the trustees had power to change. Votes bad. And so of any other charity annually distributed in the same town. *Bedford* (2): Harper's Charity. About three-fourths of those who received the charity at the last distribution paid parish rates. It had always been given to *the middling sort of people*, without solicitation on their part; had been considered as a sort of donation, and *distinguished from parish pay*. There had been no previous objection to the votes of the recipients. Votes good. And see F. & F. 435; 1 Peck. 510, n. *Bedford* (3): Hawes's Charity. The money was expended in bread given away chiefly to wives and children. It was argued that it would be unjust to deprive a man of his franchise because his wife or his child had, perhaps unknown to him, received some bread from this charity. Votes good. Ibid. Welborn's Charity.

(1) 12 Journ. 490, cited 2 Doug. Elec. C. 126. (2) 2 Doug. Elec. C. 123.
(3) 2 Doug. Elec. C. 113.

1876

HARRISON v. CARTER.

A close devised to the ministers and *overseers* of the poor of St. John's, the rents to be distributed to *the poor* on New Year's Day. Votes bad. *Colchester* (1): J. Cox had given the yearly profits of land to the poor, to be distributed at the discretion of the parish officers, on Christmas Day. Votes good. So, of Dobby's Charity, ibid. *Coventry* (2): White's and Wheatley's Gifts, receivers of, not disqualified. *Downton* (3): Lands given to feoffees, to distribute the rents among poor craftsmen and laborers surcharged by children, but 'not to go or be employed to the increase of the church box of the said parish.' This provision was not to be accounted any abatement of the collection for the church box, or *any other relief usually provided for the poor of the parish.* The trustees never gave the funds to *those who received parish relief*, but to those in need of temporary assistance only. Votes good. *Gloucestershire* (4): the voter received part of a sum given by will to the poor of T. '*who are not on the parish books* and *receive no monthly pay.*' Votes good. *Reading* (5), Kenrick's Charity: persons receiving this charity, or any other charity in Reading, held to be disqualified. *Sudbury, Cole's Case* (6): annuity to trustees to buy shirts and shifts, to be distributed by the ministers, churchwardens, *and overseers* to certain poor men and women. Votes good. Ibid.: *King's Case:* annuity to purchase one hundred loaves, one to be given to each person who had received a shirt or shift under the above bequest. In Sudbury *the overseers have nothing to do with the parish pay, the paupers there being under the government of a workhouse corporation.* Usage in favor of the vote. Votes good. *Taunton* (7): the Town charity, Meredith's and Saunders's, held to disqualify."

[LORD COLERIDGE, C.J. If the money forms part of the parish fund, to be distributed by the overseers, it would seem to fall within the description of parochial relief.]

The judgments in *Smith* v. *Hall* (8) seem to shew the true principle to be this, that, where the objects of a charitable foundation

(1) 1 Peck. 508.
(2) 16 Journ. 129, 135.
(3) 1 Lud. 193.
(4) Orme's Election Laws, 121.
(5) 16 Journ. 27; cited *Bedford*, 2 Doug. 105.
(6) Philips' Elec. C. 149.
(7) 18 Journ. 266, 286.
(8) 15 C. B. (N.S.) 485; 33 L. J. (C.P.) 59.

9 Jan 25. 1840

have vested rights, the receipt of a share of the funds works no disqualification; but that, where the gift is made from year to year at the unfettered discretion of the trustees, the recipients have no such vested interest as will deprive the gift of its eleemosynary character. Williams, J., there says (1): "I find it laid down in Heywood on County Elections,—a book of very high authority,—p. 278, that 'a distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn.'" If this be the true rule, these persons clearly fall within the category of persons who are in such a state of indigence and abject dependence that they ought to be disqualified from being on the register. To qualify them for the receipt of this charity, which is to be doled out at the discretion of the trustees, a self-elected body, they must be among the poorest inhabitants of the tything.

*Anstie*, for the respondent. Although these two persons were among the poorest of the inhabitants of the tything of Weston, they are not to be disqualified unless the alms which they have received are a part of or stand in lieu of the fund raised by the poor rates. The question has arisen upon s. 9 of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, which enacts that no person shall be enrolled as a burgess in any year, who within twelve calendar months next before the last day of August "shall have received parochial relief or other alms, or any pension or charitable allowance from any fund intrusted to the charitable trustees of such borough hereinafter (s. 71) mentioned." In *Reg.* v. *Mayor of Lichfield* (2), it was held that the word "alms" there applies only to such as are parochial, and not to moneys distributed annually from the income of a public charitable institution established by a private person for the use and benefit of the poor housekeepers of the borough not receiving parochial relief. Lord Denman, C.J., begins his judgment with words which may be prayed in aid here. "I should be content," he says, "to dispose of this rule on the principle that, in such a case, the disqualification ought to be distinctly proved, and, if there be a doubt, the

(1) 15 C. B. (N.S.) at p. 498. (2) 2 Q. B. 693.

1876

HARRISON v. CARTER.

claim of right should prevail rather than the refusal." The nature of such funds as these is pointed out also in *Rex* v. *Halesworth* (1), where lands were devised to churchwardens and overseers for the relief of the poor of H., half the revenue to be employed for the relief of widows, and the other towards binding out apprentices; and it was held that the costs of apprenticing a boy did not constitute an expense incurred by "public parochial funds," within 56 Geo. 3, c. 139, s. 11. Upon a careful review of all the decisions of the House or of election committees, it will be found that in every instance of a vote being disallowed by reason of the receipt of relief from a private charitable fund, it has been either because the fund was administered by the overseers or in some other way came in aid of the poor-rates, or by virtue of a local custom: see, amongst others, *Bedford Case* (2), Hawes's and Welborn's charities; *Colchester Case* (3), Cox's charity; *Coventry Case* (4), White's and Wheatley's gifts. *Bedford Case* (5), Harper's charity, and *Taunton Case* (6) turned on custom. In the *Downton Case* (7), the facts were these:—In the year 1626, one Stockman, of Downton, by a deed of feoffment gave certain lands to seven feoffees, to the uses and trusts named in a schedule making part of the deed. The first item in the schedule provided for perpetuating the trust; the second directed "that the rents shall be distributed yearly among such poor craftsmen and poor laborers as shall be surcharged by children within the said parish, and for their relief, as shall seem best to the feoffees, with the consent of the vicar or curate of the parish, *and not to go or be employed to the increase of the church-box of the said parish;*" and the fourth item directed "that this provision shall not be accounted any abatement of the collection for the church-box, or any other relief of the poor usually provided for the poor of the parish." According to the uniform practice in the execution of this trust, these words had been understood to direct that this charity should not be given to those who received parochial relief, and the then trustees who managed the charity never gave

(1) 3 B. & Ad. 717.
(2) 2 Doug. Elec. C. 143.
(3) 1 Peck. 508.
(4) 16 Journ. 129, 135.
(5) 2 Doug. Elec. C. 123.
(6) 18 Journ. 266, 286.
(7) 1 Lud. 193.

it to any such. It was a temporary relief; and the custom was to distribute it annually in different sums of money to those whom the trustees thought in want of it. The voter, John Edsal, had received it for three years, and within a year before the election. It was argued by the counsel for the sitting members, "that the receipt of this charity shewed the person accepting it to be in a state of dependent poverty; that such persons are always held to be disqualified by the law of Parliament, because at the time when representatives received wages it could not be supposed that such persons were able to contribute to the payment of those wages; that there is no resolution of the House concerning any place that a pauper may vote, on the contrary, whenever the question has occurred, there has passed a resolution to disqualify them; and that there could be no difference in this respect between the votes of burgage tenure and those in other rights, for, the right, though annexed to the soil, is subject to the legal disqualifications, as women, infants, &c., are held incapable of exercising it:" and the case of the *Borough of Westbury* (1) was relied on. In support of the vote, it was argued for the petitioners, "that the objection, whenever made, was considered as an unfavorable one, and the determinations have generally restrained the disqualification instead of extending it; that the Journals contain numerous resolutions of rights of election qualified by the addition of 'not receiving alms,' from which it is plain that the receipt of alms is not a general disqualification, if it were such particular resolutions would be useless; that it was not in any case a disqualification where the right of voting is not *personal*, as it is in scot and lot or corporation rights of election; that there is no resolution to disqualify freeholders of a county by receipt of alms (2), and à fortiori it cannot hold in burgage tenures; that the case of *Westbury* (1) was not applicable, because the right of voting there was not properly in burgage tenures, but a mixed right, besides that resolution passed on the receipt of *parish relief;* that, by 'receipt of alms' is always understood 'parish relief;' but that the nature of this charity was such that, even if this were not a burgage-right, or if receipt of alms were a disqualification in Downton, the

(1) 18 Journ. 154.

(2) See the *Sandwich Case*, 10 Journ. 457, commented upon by Serjt. Heywood, County Elections, 205.

1876

HARRISON v. CARTER.

acceptance of it would not disqualify:" and the *Bedford Case* (1) was relied on. The vote was admitted. That case is almost identical with the present. In many of the cases where the vote was allowed by the committee, the circumstances of the voter presented every mark of indigence the most abject. Here, the money forms no part of the parochial funds; nor have the parish officers any part in its distribution. The onus of shewing the disqualification rests on the appellant.

*Arbuthnot,* in reply. If reliance is to be placed on the decisions of committees, the *Aylesbury Case* (2) is precisely in point. In *Reg.* v. *Mayor of Lichfield* (3), Lord Denman expressly declines to found his judgment in any degree on s. 36 of the Reform Act.

[LINDLEY, J., referred to *Bishop of Hereford* v. *Adams.* (4)]

LORD COLERIDGE, C.J. We are called upon to put a construction upon certain words in two Acts of Parliament, viz. s. 36 of the Reform Act, 2 Wm. 4, c. 45, and s. 40 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. By the former it is enacted that "no person shall be entitled to be registered in any year as a voter for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." We are called upon to determine what were the "alms" which by the law of Parliament as it existed at the time of the passing of the first Reform Act disqualified from voting. The question arises upon a trust created in favor of the poor of the tything of Weston in the borough of Petersfield. The trust is thus expressed:—"Upon trust and confidence, and to the intent and purpose, that all the yearly rents, issues, and profits of the said messuage, land, and premises shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the tything of Weston aforesaid; and the overplus thereof shall be distributed unto the poorest inhabitants of the said

(1) 2 Doug. Elec. C. 94, 113.
(2) 12 Journ. 490, cited 2 Doug. 126.
(3) 2 Q. B. 700.
(4) 7 Ves. 324.

tything of Weston aforesaid as my said trustees and their heirs shall think fit." It is found by the revising barrister that the overplus, after making payments for education, apprenticeship-fees, and sundry expenses, generally amounts to about 40*l.*, which sum is distributed once in each year by the trustees amongst about eighty of the laboring population of the tything of Weston, according to their discretion, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family. It is found also that personal application is not made to the trustees, but that they make inquiry and decide who are fitting persons to receive grants from the charity. It is further found that both these persons received 12*s.* 6*d.*, the largest sum granted; that both were proper recipients of the charity; that both are agricultural labourers, and married, one having five children, the other four; that one of them had in the year preceding the electoral year received parochial relief, and that the other had applied for it but did not get it. These are the facts to which we have to apply the law. It is plain that both these persons have received "alms," but not "parochial relief." The dry question is, whether that which they have received is "other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament."

Now, "the law of Parliament" must mean the law as administered at the time of the passing of the Reform Act by committees of the House of Commons, before the decisions of this Court upon appeals from revising barristers and on election petitions. If we can extract any principle from any of the decisions of those committees, or of this Court since their jurisdiction was transferred to this Court, we are bound to do so. But, as has been pointed out in the course of the argument, the decisions of the committees have been so conflicting that it is not easy to extract a principle from them. Many of them have been referred to, but no great light is to be derived from them. We have, however, been referred to *Smith* v. *Hall* (1), where something like a principle was laid down by four very learned judges. In that case it was sought to disqualify the brethren of the hospitals of St. Bartholomew and St. John in the borough of Sandwich by reason of the receipt of alms: but, inasmuch as the possession of the houses and the re-

(1) 15 C. B. (N.S.) 485; 33 L. J. (C.P.) 59.

1876

HARRISON v. CARTER.

ceipt by each inmate of a share of the revenues was a matter of right, the objection was disallowed. Erle, C.J., in giving judgment, says (1): "If we are to resort to conjecture as to the meaning of the legislature,—which evidently was *that persons so placed by their indigence as to be presumably subservient and destitute of all freedom of mind should not be permitted to exercise the franchise*,—I must own that I should think that these freemen, by reason of their having a house and a share in the profits of the land belonging to the hospital for life, are gifted with a far greater probability of independence than those who have nothing to rely on but the precarious proceeds of their own labor." And Williams, J., refers to the distinction already mentioned as supported by Serjt. Heywood, County Elections, p. 278. As far, therefore, as we can extract from those judgments the principle upon which the decision proceeded, it is this, that the voters there were not disqualified, because they were not in a state of complete indigence and dependence, and that they would have been held to be disqualified if they had been in that condition. Fellows of colleges in the universities are in one sense the recipients of alms, because they receive funds which originally were of an eleemosynary character; and yet a fellow is not disqualified on that ground. What, then, is the position of these persons? From the facts stated by the revising barrister it is plain that both were on the absolute verge of the necessity of coming on the parish. They are recipients of a charity which by the terms of its creation is to be distributed amongst "the poorest inhabitants of the tything," and at the absolute discretion of the trustees, who it seems are a self-elected body. It must be obvious to anybody of ordinary experience that persons in that position are just the persons who are most likely to be susceptible of manipulation for a purpose which the legislature has always been anxious to discourage, and peculiarly open to the temptation from which this enactment was meant to shield them. I do not profess to lay down a formula which will meet every case: each must depend upon its own particular circumstances. It is enough to say that, in my judgment, these persons are within the disqualification which Parliament by this provision intended to create, or, rather, to continue. I think they were in the receipt of alms which by the law of Parliament disqualified

(1) 15 C. B. (N.S.) at p. 498.

them from voting. I therefore think the decision of the revising barrister must be reversed.

LINDLEY, J. I am of the same opinion. The revising barrister finds these two persons to be qualified, subject to the question whether they are disqualified by the receipt of alms "which by the law of Parliament disqualified them from voting in the election of members to serve in Parliament." They had not within the electoral year received parochial relief: the question is whether they had received "other alms" of a disqualifying character. If the words had been "parochial or other alms," these persons clearly would have been within the terms of s. 36. The difficulty is raised by the subsequent words, "which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." Several decisions of election committees have been referred to on either side: but it is difficult to discover the principle upon which the decisions or resolutions proceeded. We cannot say there was none, because the legislature assumes otherwise. Let us see, then, what is likely to be the principle underlying the cases. First, it is suggested that the principle is this, that the disqualification attaches where the distribution is made by the parish authorities. I cannot think that that is so: the matter cannot depend upon the character of the trustees. The other principle suggested is, whether the recipient is in such a position as to be dependent on the fund. Poverty alone will not do. If the fund is one in which the party is legally entitled to participate, as in *Smith* v. *Hall* (1), he is not disqualified; but, if his only claim to the exercise of the discretion of the trustees in his favor is his extreme indigence, it would seem to be otherwise. Here, we have all the three elements of disqualification, as pointed to in the decisions,—poverty, the receipt of alms, and the absence of that independence which is essential to the qualification of a voter. I agree with my Lord that the decision must be reversed.

*Decision reversed.*

Solicitor for appellant: *F. L. Soames, for J. Soames, Petersfield.*

Solicitors for respondent: *Rogerson & Ford, for Albery & Lucas, Midhurst and Petersfield.*

(1) 15 C. B. (N.S.) 485; 33 L. J. (C.P.) 59.

1876
*Nov.* 18.

DAWSON, APPELLANT; ROBINS, RESPONDENT.

*Parliament—County Vote—Rent-charge on Reversion—Power of Distress.*

By indenture of September, 1874, the reversion in fee in certain lands was conveyed to C., subject to certain terms of 1000 years created by indenture of demise of July, 1864, which reserved a ground-rent and a power of re-entry in default. C. by indenture of January, 1875, granted to D. and to four other persons a rent-charge of 2*l.* 10*s.* each charged upon the lands, with a power of distress in default of payment, and the grantees were in the actual receipt of the same. The value of the reversion was sufficient to bear the charges:—

*Held*, that the grantees of the rent-charges had "free land or tenement to the value of 40*s.* by the year" within 8 Hen. 6, c. 7, although the power of distress was nugatory.

APPEAL from the revising barrister for the Southern Division of the county of Hants.

Objection was made to the claim of Oliver Robert Dawson to have his name inserted in the list of voters in the parish of St. Mary.

The qualification stated in the claim was "a freehold rent-charge" issuing out of houses and land, Itchen Road and Dock Street, Henry Compton owner.

It appeared that by an indenture of the 29th of September, 1874, the reversion in fee in the premises was conveyed to Henry Compton, subject to certain leases of 1000 years each created by indenture of demise of the 29th of July, 1864. In each of these leases a ground-rent was reserved, and in each was contained a power of re-entry in default. These leases are still subsisting.

By indenture of 15th of January, 1875, Henry Compton granted to Oliver Robert Dawson a yearly freehold rent-charge of 2*l.* 10*s.* charged upon the said premises. This indenture also contained a power of distress in default of payment of the rent-charge.

It was not disputed that the reserved ground-rent was amply sufficient to meet this and other rent-charges granted about the same time and issuing out of the same premises, and that the amount due to Oliver Robert Dawson and the other grantees had been actually paid to each of them respectively by the agent of Henry Compton.

The revising barrister was of opinion that, considering the

nature of Henry Compton's interest, the power of distress contained in the indenture of the 15th of January, 1875, was nugatory, and disallowed the claims of Oliver Robert Dawson and of four other persons whose claims to be inserted in the list were objected to on the same grounds.

If the Court should be of opinion that his decision was wrong, the register was to be amended by inserting the names of Oliver Robert Dawson and the four other persons.

*E. Ridley*, for the appellant. The test applied by the revising barrister in this case was not the true one, viz. that there is no available power of distress. A distress is not the only remedy. In *Dodds* v. *Thompson* (1) it was held that a rent-charge granted by a deed containing no power of distress is within 4 Geo. 2, c. 28, s. 5, and therefore a "tenement" within 8 Hen. 6, c. 7. Willes, J., there says: "It cannot be said that a rent-service or a rent-seck did not fall within the description of a 'tenement' in Co. Litt. 6. a. 'Tenementum, Tenement,' says Coke, 'is a large word to passe not only lands and other inheritances which are holden, but also offices, *rents*, commons, profits à prendre out of lands, and the like, wherein a man hath any frank-tenement, and whereof he is seised ut de libero tenemento.'" Byles, J., says: "It seems to me to be clear that, before the abolition of real actions (by 3 & 4 Wm. 4, c. 27), a rent issuing out of land was a 'tenement' within the 8 Hen. 6, c. 7. The only difficulty here is that the deed which creates the rent contains no power of distress. Since the 3 & 4 Wm. 4, c. 27, no real action would lie for it; nor, it seems, would a personal action. No remedy for enforcing the rent being pointed out at law, and it being doubtful whether there be any in equity, this is an à fortiori case for the application of the statute 4 Geo. 2, c. 28, s. 5." [*Webb* v. *Jiggs* (2), *Thomas* v. *Sylvester* (3), and *Whitaker* v. *Forbes* (4), were also referred to.]

*Chester*, for the respondent. The real question is whether this deed creates such an interest in the grantee of the rent-charge as will entitle him to have recourse to the land itself, or only gives him a personal remedy against the grantor.

(1) Law Rep. 1 C. P. 133.
(2) 4 M. & S. 113.
(3) Law Rep. 8 Q. B. 368.
(4) Law Rep. 10 C. P. 583.

1876

DAWSON v. ROBINS.

[LORD COLERIDGE, C.J. Does the character of the remedy alter the right?]

It is essential that the owner of a rent-charge should be able to come upon the land. Here, there is no remedy against the land.

[LINDLEY, J. What do you say to the remedy by bill in equity, as in *White* v. *James?* (1)]

The remedy in Chancery would be to impound the rent when received. The grantee could not go upon the land.

[LINDLEY, J. Could he not get a receiver?]

The receiver could be in no better position in this respect than the grantee himself.

[LORD COLERIDGE, C.J. *Dodds* v. *Thompson* (2) is precisely in point. Is a power of distress which you cannot exercise worse than none?]

In that case, Dodds, under 4 Geo. 2, c. 28, s. 5, could go on the land and take a distress. Here, Dawson could not. In Bac. Abr. *Rent* (B), "It is laid down as a general rule that no rent can issue out of any incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress. So, rent cannot issue out of a rent, for, the statute of Westm. 2 (13 Ed. 1, ch. 1) gives an assize in certo loco capiendo; but a rent cannot be put in view." The owner of a second rent cannot go upon the land.

[LORD COLERIDGE, C.J. Dawson is in possession of a rent-charge created by deed, and is in full enjoyment. What more can be wanted?]

The policy of the law contemplates that if the voter has not land itself, he shall have a rent issuing out of the land itself. Frank-tenement is something connected with the land. How connected? Only in consequence of its being actually issuing and payable out of the land. Here, the rent does not issue out of the land. It is a mere undertaking by the reversioner that the grantee shall have the money: he cannot have recourse to the land. In *Thomas* v. *Sylvester* (3), there was a good rent-charge created out of a seisin in fee. Here there is no grant of the reversion or any

(1) 26 Beav. 191; 28 L. J. (Ch.) 179.
(2) Law Rep. 1 C. P. 133.
(3) Law Rep. 8 Q. B. 368.

part of the reversion, which is the proper form of creating an interest of this sort.

[LORD COLERIDGE, C.J. It is the ordinary form of a grant of a rent-charge.]

This is more like the equitable right which the inmates of Bottesford Hospital had in *Steele* v. *Bosworth.* (1)

*Ridley* was not heard in reply.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister was wrong and must be reversed. A very ingenious argument has been addressed to us as to matter which in my judgment does not arise here. I am to look to see whether the persons whose claims to be registered have been disallowed possess the qualification required by the statute 8 Hen. 6, c. 7, that is, whether they are persons who have "free land or tenement ('franktenement' in the original) to the value of 40*s.* by the year at the least above all charges." Now, have these persons free land or tenement to the required value? From the case which is before us we find that, by an indenture of the 29th of September, 1874, the reversion in fee in certain lands was conveyed to one Compton, subject to certain leases of 1000 years each created by indenture of demise dated the 29th of July, 1864, reserving a ground-rent and a power of re-entry in default. He being the reversioner, and the value of the reversion being sufficient to bear the charges he makes upon it, Compton wishes to give a franktenement to a number of persons, and accordingly, he by a good assurance grants to each of them a freehold rent-charge of 2*l.* 10*s.* charged upon the premises, with a power of distress in default of payment; and the grantees are in the actual receipt of the rent. I am of opinion that each of these persons has free land or tenement to the value of 40*s.* by the year at the least above all charges, within 8 Hen. 6, c. 7, and is consequently entitled to be registered as a voter.

LINDLEY, J. I am of the same opinion. The question resolves itself into two,—1. What is the interest which each of these persons has?—2. What is the value of that interest? Each has a freehold interest in the land, a rent-charge charged upon a reversion in fee, expectant on the determination of certain outstanding

(1) Hop. & Ph. 106; 18 C. B. (N.S.) 22; 34 L. J. (C.P.) 57.

1876

DAWSON v. ROBINS.

terms. That is a freehold interest. Then comes the question of value. It is found that the land is of ample value to bear all the charges upon it, and that the claimants are in the actual receipt of the rent. It has a market value; and for its enforcement there are remedies against the land, as distinguished from remedies against the person of the grantor. The grantee may by pursuing the proper course procure a sale of an adequate portion of the reversion to pay the rent. It is no sufficient answer, therefore, to say that there is no available power of distress. I think the decision must be reversed.

*Decision reversed.*

Solicitors for appellant: *Roberts & Barlow, for Coxwell, Bassett, & Stanton, Southampton.*

Solicitors for respondent: *Clarkes, Rawlins, & Clarke, for Bradley, Robins, & Son, Southampton.*

END OF REGISTRATION CASES.

---

*Nov.* 30.

[IN THE COURT OF APPEAL.]

CHATTERTON AND ANOTHER *v.* CAVE.

*Dramatic Copyright—Infringement—Material Part*—3 & 4 *Wm.* 4, *c.* 15, *s.* 2.

In order to recover penalties under the Dramatic Copyright Act, for pirating a dramatic production, the plaintiff must shew that a material and substantial part has been pirated.

Aff'd 4th H.L. 3 App Cas 483.

ACTION to recover penalties for representing a dramatic piece, called the Wandering Jew, of which the plaintiffs had the sole right of representation. At the trial before Lord Coleridge, C.J., it was proved that there was a dramatic version of the Wandering Jew in French. The plaintiffs were the assignees from the author of an English drama called the Wandering Jew, which was a translation or adaptation taken from the French drama. The defendant also had brought out an English drama called the Wandering Jew, the representation of which was the alleged infringement of the plaintiffs' copyright. By agreement between the parties it was arranged that the jury should be discharged; that the Chief Justice should read the two pieces and the French

play from which both were taken, and should order how the verdict should be entered; leave being reserved to either party to move.

The Chief Justice found that two specified scenes or points in the defendant's drama had been taken from the plaintiffs' drama, and that except in these respects the defendant's drama was not a copy from that of the plaintiffs. He directed the verdict to be entered for the defendant.

The plaintiffs obtained a rule to enter the verdict for the plaintiffs; which rule was discharged by the Court of Common Pleas. (1)

The plaintiffs appealed.

The facts are fully stated in the report in the Court below.

*Poulter* and *A. B. Terrell* (with them *Day, Q.C.*), for the plaintiffs. In the first place, there is no finding that the part taken was not material or substantial, and on the finding of the judge the verdict might have been for the plaintiffs.

[COCKBURN, C.J. This was explained by the Chief Justice on the argument of the rule. The plaintiffs, in fact, say that the finding is imperfect; and, if so, we ought to refer it back to the Chief Justice for amendment.

MELLISH, L.J. It does not matter whether we take the finding from what the Chief Justice has written or from what he has said. It seems to me that on the questions of fact the plaintiffs are concluded.]

Then, on the second point, assuming that what has been taken is not material or substantial. No such words occur in the Act 3 & 4 Wm. 4, c. 15, s. 2, and the plaintiffs have a right to be protected against any infringement whatever. The Act was passed to protect dramatic authors, and it is not damages, but a penalty, for which the plaintiffs sue. It is impossible to draw a line as to what may be copied and what may not. No such distinction was admitted in *Planché* v. *Braham* (2); *D'Almaine* v. *Boosey*. (3) This is not an application for an injunction as in *Pike* v. *Nicholas* (4), where the damage must be material in order to induce the Court to interfere. The Act is explicit that the penalty is incurred if any part is taken, and why are these words to be limited?

(1) Law Rep. 10 C. P. 572.
(2) 4 Bing. N. C. 17.
(3) 1 Y. & C. Ex. 301.
(4) Law Rep. 5 Ch. 251.

1876

CHATTERTON v. CAVE.

*Digby Seymour, Q.C.*, and *Lumley Smith*, for the defendant, were not called upon.

COCKBURN, C.J. On the first point we are bound as to the facts by the finding of the Chief Justice of the Common Pleas, to whom the question was left for decision without the intervention of a jury. I think that we must take his decision to be expressed in his finding, as explained by him during the discussion before the Court of Common Pleas. Taking the whole together, the facts are these. It is found that the defendant has taken certain scenes and points from the plaintiffs' play, and what I should have had more doubt about, that he has not taken them from the common source. Then we must take it to be found as a fact that the incidents of the scenes so taken were not of substantial value. We are, I think, bound by that finding, and the question is whether the law, as laid down by the Court of Common Pleas, is to be affirmed by us. The proposition asserted and acted upon by that Court is that the Act of Parliament was passed for the purpose of protecting dramatic compositions from being copied when that which is taken is of substantial value. It was pressed upon us, on behalf of the plaintiffs, that anything taken from a book or a play would bring the taker within the Act, and that the Act did not say that the quantity taken must be material or substantial. But the Act must receive a reasonable construction; and, whilst we are anxious to protect the property of authors, we must be careful not to withdraw from the common stock of literature or art that which is of no substantial value, as was held in *Pike* v. *Nicholas* (1) and *Bradbury* v. *Hotten* (2), or encourage litigation as to things which have no substantial value. We are of opinion that the judgment of the Court of Common Pleas is quite right.

MELLISH, L.J., AMPHLETT and BRAMWELL, JJ.A., concurred.

*Judgment affirmed.*

Solicitor for plaintiffs: *Chatterton.*
Solicitors for defendant: *Lewis & Lewis.*

(1) Law Rep. 5 Ch. 251. (2) Law Rep. 8 Ex. 1.

[IN THE COURT OF APPEAL.]

1876
*Dec.* 12.

FOX *v.* WALLIS.

*Appeal—Notice of Motion—Time—Judicature Act*, 1875—*Order LIII., Rule* 4—*Order LIV., Rule* 6.

Where notice of motion of appeal from a decision in chambers was given on the eighth day after the decision:—

*Held*, that under Order LIV., Rule 6, it was too late, as the notice must be given so that the motion can be heard within eight days after the decision appealed against.

In this case an order to refer back an award had been made by Huddleston, B., at Chambers, on the 12th of May. The plaintiff, on the 20th of May, gave notice of his intention to move by way of appeal on the 26th of May. There was no opportunity to move until the 27th of May, when the motion was made before Brett and Denman, JJ., who refused to hear it on the ground that the plaintiff was, under Order LIV., Rule 6, too late. (1)

The plaintiff appealed.

*Philbrick, Q.C.*, and *Reginald Brown*, for the plaintiff. The meaning of the order is that the party who wishes to appeal must do all that he can within the eight days, which is by giving notice of motion; and that is enough, though under Order LIII., Rule 4, the motion may not be heard until after the eight days have expired. (2) It may be that no Court is sitting, and it may be impossible to make the motion within the eight days. It cannot be the intention of the legislature that in all such cases it must be necessary to apply for an extension of time. In *Crom* v. *Samuels* (3) it was held that the time did not run when the Court was not sitting: *Whycherley* v. *Barnard*. (4)

(1) Order LIV., Rule 6: "In the Queen's Bench, Common Pleas, and Exchequer Divisions, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against."

(2) Order LIII., Rule 4: "Unless the Court or judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion."

(3) Ante, p. 21.

(4) Joh. 41.

1876

FOX v. WALLIS.

[KELLY, C.B. Here the eight days must expire before the day on which under this notice the motion could be made.]

*Cole, Q.C.*, and *Woollett*, for the defendant, were not called upon.

COCKBURN, C.J. This appeal cannot be allowed.

KELLY, C.J., BRAMWELL and AMPHLETT, JJ.A., concurred.

*Appeal dismissed.*

Solicitor for plaintiff: *Doyle.*
Solicitor for defendant: *Robinson.*

---

*Dec.* 12.

[IN THE COURT OF APPEAL.]

## THE CROYDON COMMERCIAL GAS COMPANY *v.* DICKINSON AND OTHERS.

*Principal and Surety—Giving Time—Separate Payments.*

8 App Cas 751.

A principal (with sureties for the performance of the contract) contracted to take tar from a gas company, and to pay for each month's supply within the first fourteen days of the ensuing month, unless the company should by writing allow a longer time for payment. After the expiration of the first fourteen days of August the company took a promissory note from the principal for the amount due for July. Default was made by the principal in payment of the amounts due for July, for August, and for September:—

*Held*, affirming the judgment of the Common Pleas Division, that, time having been thus given for the payment of the amount due for July, the sureties were discharged as to that amount; but, reversing the judgment of the Common Pleas Division, not as to the amounts due for August and for September; the contract being separable, and the position of the sureties as to those amounts not being affected by the giving time for payment of the amount due for July.

THE Croydon Commercial Gas Company and one Dickinson, on the 20th of January, 1874, made an agreement that Dickinson would buy from the company their surplus ammoniacal liquor on certain terms, one of which was, that the amount supplied should be estimated on the last day of each month, and payment for the same made within the next fourteen days, unless the company should allow a longer time for payment. Pollard and Child

1876

CROYDON GAS CO. v. DICKINSON.

became sureties for the performance by Dickinson of this agreement. The account for July, 1875, was sent by the company to Dickinson. He paid part, and left a balance of 115*l.*, for which the company, on the 21st of August, took his promissory note. In August a further sum of 49*l.* became due to the company, and in September a further sum of 69*l.*, making together 118*l.* The company brought an action against Dickinson, Pollard, and Child, which was continued against Pollard alone. At the trial judgment was entered for Pollard, leave being reserved to the plaintiffs to move to enter judgment for the 115*l.* or the 118*l.*, or for both sums.

The plaintiffs accordingly moved in the Common Pleas Division before Brett, Grove, and Denman, JJ., who directed judgment to be entered for the defendant, the Court being of opinion that taking the promissory note for 115*l.* was giving time not within the contract, and operated to discharge the sureties as to that sum; and, further, that, being discharged as to that payment, the sureties were altogether discharged. (1)

The plaintiffs appealed.

*Grantham* and *Hope* (with them *Day, Q.C.*), for the plaintiffs. There is nothing in the agreement to limit to the fourteen days the time within which extended credit may be given, and no harm can have been done to the sureties by not compelling payment. In *Eyre* v. *Bartrop* (2), on which the judgment in the Court below proceeded, there was a clear alteration of the contract. In this case each payment was separate, and giving time for one could not affect the others.

*A. L. Smith* and *Macdonald* (with them *Wormald* and *R. Bray*), for the defendant. The giving time for the July payment was clearly not within the contract, and the contract is indivisible. By giving time they altered the whole arrangement: *Polak* v. *Everett* (3); *Samuell* v. *Howarth*. (4) The surety, in fact, says that the debtor is not to be trusted too long or with too much. By allowing the debtor to get into arrear they leave an accumu-

(1) 1 C. P. D. 707.
(2) 3 Madd. 221
(3) 1 Q. B. D. 669.
(4) 3 Mer. 272.

1876

CROYDON GAS CO. v. DICKINSON.

lation of debt which he is unable to meet. It is impossible to say that the surety has not been damnified by such a variation of the contract.

COCKBURN, C.J. On the first point I will say nothing, as it is clear that with respect to the July payment the surety was discharged. As to the second point, the only doubt in my mind was raised by the argument of Mr. Smith, that giving time not according to the power reserved, but after the time agreed upon, had done the defendant a wrong. If I could see that the defendant had actually been damnified by this I should have thought much more of that argument. It was further argued by Mr. Smith that the possibility of damage altered the position of the surety. I feel some slight doubt whether that argument is not good, but I willingly stifle that doubt in deference to the decided opinions of my learned Brethren.

KELLY, C.B. For myself, I may say that I am clearly of opinion that the judgment of the Common Pleas Division, as to the August and September instalments, was erroneous. [His Lordship then stated the facts.] Now, the July instalment stands on a different footing from the August and September instalments. Payment, according to the clause in the agreement, ought to have been made fourteen days from the end of the month of July, unless within those fourteen days the time was enlarged by the plaintiffs who supplied the commodity. It was actually enlarged by them by taking a promissory note at one month. No doubt that gave time, and, looking at the terms of the contract, I am clearly of opinion that what was done was not an enlargement of the time for payment within the clause, to satisfy which it must have been done within the fourteen days. But fourteen days and some little time beyond elapsed before the transaction took place between the parties, and during the intervening period the surety might have paid the amount due to the creditor, and then have immediately sued the principal debtor. Therefore, I consider that the surety was discharged as to the July payment.

The question arising as to the other two payments is of a totally

1876

CROYDON GAS CO. v. DICKINSON.

different character, but I am at a loss to understand how there can be any substantial doubt about it. It has been contended by Mr. Smith, that there was but one contract, and that therefore if time was given in respect of one performance under it, that operated as a discharge of the whole contract. But although in one sense it was one contract, yet, in effect, it was as much three several contracts as if it had been created by three separate instruments. In each month the account was made out and the debtor failed to pay. The surety has been sued and he refuses to pay. Mr. Smith says the position of the surety has been changed; I cannot see in what particular that is so. He might, at the expiration of the fourteen days, as he may now, himself pay the creditor and then bring an action against the principal debtor for the money paid. In neither of these latter months has anything occurred to alter the position of the surety. It is therefore the common case of principal and surety. As to the first instalment, the surety must be held released, and the decision of the Common Pleas Division is right. As to the August and September payments it is different, and the decision of the Common Pleas Division must be reversed.

BRAMWELL, J.A. I am of the same opinion; and as I differ from the judges of the Common Pleas Division, I must state briefly the reasons for my conclusions. [His lordship then gave his reasons for coming to the opinion that, as to the July payment, the taking of the promissory note after the fourteen days had elapsed, discharged the sureties.] As to the second point, it has been strongly argued that something had occurred which discharged the surety. But I do not think it is so. There are three ways in which the surety might be discharged. First, by time being given to the debtor; secondly, by an alteration in the contract between the principals; and, thirdly, by the principals dealing together so as to affect the position of the surety to his prejudice. No question of giving time arises as to the last two payments; but as to the meaning of the other two propositions, some doubt arises. Perhaps, if it had been left to the jury, they might have said there was some alteration in the contract between

1876

CROYDON GAS CO. v. DICKINSON.

the principals. Perhaps, again, they might have said that the surety was prejudiced by the dealings of the principals. But no such questions were left to them, and we are reduced to the bare question whether the giving of time to the principal as to the July supply discharged the surety from his liability as to the August and September supplies. Now, as to this, it seems to me a pertinent question to ask, Why should it? I wish the judges in the court below had put this question to themselves instead of considering themselves bound by certain cases on the point. I think that if they had exercised their own judgments in the matter they would not have arrived at the conclusion which they appear to have formed. I can see no reason why, there being two debts, the giving of time for the payment of one should release the surety from his liability as to the other. I asked Mr. Smith whether, if one were surety for the payment of rent and the observance of covenants by a tenant under a lease, and the landlord chose to release the principal from the payment of his rent, the surety would be discharged as to the covenants. He said, Yes. But he could not give any reason for so saying, though he said that the cases decided that it was so. Now, none of the judges below seem to have thought much of the authorities on the subject, though they followed those authorities. Mr. Justice Brett cites *Eyre* v. *Bartrop* (1), and, saying "That being so," gives his judgment for the defendant. Mr. Justice Grove's judgment is somewhat similar, and so is that of Mr. Justice Denman. Therefore I do not find myself bound by the deliberate opinions of these judges, and I am merely confronted by their appreciation of *Eyre* v. *Bartrop*. (1) And I think their appreciation of that case was wrong. Sir John Leach, as I read his judgment, says that if the contract was not wholly altered, the subsequent payments of the annuity might have been recovered, but that these changes in the contract had wholly altered the position of the surety. If that were the case here—for instance, if it had been arranged between the principals that the plaintiffs should always give time, and the debtor should always give a note, the surety might be held not liable. That, however, was not the case, and having no real opinion of the judges of the Common Pleas

Division to meet, and believing as I do that the case of *Eyre* v. *Bartrop* (1) does not touch the point, and not having heard a particle of reason why the plaintiffs may not recover as to the August and September supplies, I am of opinion that they can recover, and that our judgment on that point should be in their favour.

AMPHLETT, J.A. I am of the same opinion. As to the first point, I entirely agree with the conclusion and with the reasons which have been given. As to the second point, on which we reverse the judgment of the Court below, I must state very briefly the reasons why I cannot concur in that judgment. If I could see that the position of the surety was in any way altered as to the payments to be made in August and September, I should not be very nice to ascertain whether the alteration was to his detriment or not. The rule is, that when time is given, or the position of the surety has been altered by the dealings of the principals, the surety is discharged. That must, however, be taken with certain limitations; that is to say, if it depends upon inquiry, the Court will not go into that inquiry, and unless the fact is self-evident, the Court will not consider the question: and of course the rule will not be applicable where the change cannot be otherwise than advantageous to the surety. For instance, if a surety has joined in a bond for 1000*l.*, and the creditor agrees that the debt shall be 500*l.* only, then the alteration can only be for the benefit of the surety, and his responsibility cannot be lost by the change. Here it seems to me that what was done in the way of giving time for the July payment cannot affect the position of the surety as to the subsequent payments. In fact, the only way in which it could be argued was, that in July the payment not being made at the proper time, there was a larger demand upon the principal debtor when the subsequent instalment became due. The answer to that is, that the position of the debtor is the same as if there had been no demand at all in July, and then in September there would be the same accumulation of payments, and yet it would be impossible to say that the surety was damaged by the indulgence being

(1) 3 Madd. 221; Tu. L. C. 901.

1876

CROYDON GAS CO. v. DICKINSON.

given. Under these circumstances, it appears to me that if anything had been done with respect to the future payments, the surety would have been damaged by time having been given, but that what has been done does not affect the position of the surety as to the subsequent payments.

What Sir J. Leach said in *Eyre* v. *Bartrop* (1) was that if there had been no change as to the subsequent payments in the position of the surety, that would be a good answer ; but then he said that that was not the fact, and that the deed had altered the position of the surety. That case, therefore, does not bear out the judgment of the Court below.

Then as to the dealings between the creditor and the debtor, I can see no foundation for the proposition that those dealings were injurious to the surety. The question as to these dealings was not raised before the jury, and I see no reason for holding that there were any such dealings. That part of the judgment ought, in my opinion, to be reversed.

*Judgment reversed as to the sum of* 118*l. and entered for the plaintiffs.*

Solicitors for plaintiffs: *Prior, Bigg, & Co.*
Solicitor for defendant: *S. J. Robinson.*

(1) 3 Madd. 221; Tu. L. C. 901.

[IN THE COURT OF APPEAL.]

1876
*Dec.* 15.

SEAMAN *v.* NETHERCLIFT.

*Slander—Privilege of Witness—Answer as to Credit of Witness.*

A witness in a court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.

A statement, as to another matter, made to justify the witness in consequence of a question going to the witness' credit, has reference to the inquiry within the above rule.

Defendant, an expert in handwriting, gave evidence in the trial of *D.* v. *M.* that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of a document, on a charge of forgery before a magistrate. In cross-examination he was asked whether he had given evidence in the suit of *D.* v. *M.*, and whether he had read the judge's remarks on his evidence. He answered, "Yes." Counsel asked no more questions, and defendant insisted on adding, though told by the magistrate not to make any further statement as to *D.* v. *M.*: "I believe that will to be a rank forgery, and shall believe so to the day of my death."

An action of slander for these words having been brought by one of the attesting witnesses to the will:—

*Held*, that the words were spoken by defendant as a witness, and had reference to the inquiry before the magistrate, as they tended to justify the defendant, whose credit as a witness had been impugned; and that the defendant was, therefore, absolutely privileged.

APPEAL from the decision of the Common Pleas Division, ordering judgment to be entered for the defendant. (1)

Claim: that defendant said of a will, to the signature of which the plaintiff was a witness, "I believe the signature to the will to be a rank forgery, and I shall believe so to the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery.

Defence: that defendant spoke the words in the course of giving his evidence as a witness on a charge of forgery before a magistrate.

Reply: that the words were not bonâ fide spoken by defendant as a witness, or in answer to any question put to him as a witness,

(1) 1 C. P. D. 540.

1876

SEAMAN v. NETHERCLIFT.

and he was a mere volunteer in speaking them for his own purposes otherwise than as a witness and maliciously and out of the course of his examination.

The facts are fully given in the judgment of the Common Pleas Division, and are sufficiently stated in the head-note.

*M. Chambers, Q.C.*, and *J. Torr*, for the plaintiff, contended that the privilege of a witness was not unqualified, but was confined to matter strictly relevant to the issue; and that malice would also deprive the witness of the privilege; and that the statement of the defendant was, as the jury had found, volunteered after the defendant's examination as a witness was over. They cited and minutely commented upon the following authorities: Roscoe's N. P. Evidence, p. 835; *Ayres* v. *Sedgwick* (1), in which *Brode's Case*, Hil. 37 Eliz., and *Chamberlaine's Case*, 7 & 8 Eliz. are cited; *Harding* v. *Bullman* (2); Bac. Abr. tit. Slander (E); *Buckley* v. *Wood* (3); *Trotman* v. *Dunn* (4); *Hodgson* v. *Scarlett* (5); *Revis* v. *Smith* (6); *Dawkins* v. *Lord Rokeby* (7); *Kennedy* v. *Hilliard* (8); *Allardice* v. *Robertson.* (9)

*McIntyre, Q.C.*, and *Edward Clarke* (*Agabeg* with them), for the defendant, contended that as long as the witness was acting as a witness the privilege was absolute, and this was supported by a long series of authorities. The finding, therefore, of the jury as to malice was immaterial, and it was contrary to the evidence that the defendant had ceased to be a witness when he spoke the words complained of as slander. They commented on the cases cited for the plaintiff, and cited *Rex* v. *Skinner* (10); *Scott* v. *Stansfield* (11); *Astley* v. *Younge* (12); *Henderson* v. *Broomhead* (13); *Thomas* v. *Churton* (14); *Mackay* v. *Ford.* (15) And they relied especially on *Dawkins* v. *Lord Rokeby* (7) as an à fortiori case.

(1) Palm. 142, 144, 145.
(2) 1 Brown. & Golds. 2.
(3) Cro. Eliz. 230, 248; 4 Co. 14 b.
(4) 4 Camp. 211.
(5) 1 B. & Ald. 232.
(6) 18 C. B. 126, 141; 25 L. J. (C.P.) 195.
(7) Law Rep. 7 H. L. 744, 752, 754.
(8) 10 Ir. C. L. Rep. 195.
(9) 1 Dow, (N.S.) 495, 515.
(10) Loft, 55.
(11) Law Rep. 3 Ex. 220.
(12) 2 Burr. 807.
(13) 4 H. & N. 569; 28 L. J. (Ex.) 360.
(14) 2 B. & S. 475; 31 L. J. (Q.B.) 139.
(15) 5 H. & N. 792; 29 L. J. (Ex.) 404.

*M. Chambers, Q.C.*, in reply.

1876

SEAMAN v. NETHERCLIFT.

COCKBURN, C.J. The case is, to my mind, so abundantly clear, and I believe to the minds of my learned Brothers, that I think we ought not to hesitate to at once pronounce our decision.

The plaintiff brings his action against the defendant for slander, alleged to have been uttered on the occasion of a prosecution for forgery before a magistrate of the city of London. The defence set up is: "True, I did utter the words imputed to me, but I spoke them when I was a witness in a case in which I was called as a witness." The plaintiff's answer to that is, "Yes, you were called as a witness, but you spoke these words when you were no longer giving evidence, and not only knowing them to be false, but also not in the inquiry, and dehors altogether the subject-matter of the inquiry, for your own purpose of maliciously defaming me." At the trial before Lord Coleridge it appeared that in the Probate suit of *Davies* v. *May* the defendant had been examined, as an adept, to express his opinion as to the genuineness of a signature to a will, and he gave it as his opinion that the signature was a forgery. The president of the Court, in addressing the jury, made some very strong observations on the rashness of the defendant in expressing so confident an opinion in the face of the direct evidence. Soon afterwards, on a prosecution for forgery before the magistrate, the defendant was called as an adept by the person charged, when he expressed an opinion favourable to the genuineness of the document. He was then asked by the counsel for the prosecution whether he had been a witness in the suit of *Davies* v. *May*. He answered "Yes." And he was then asked, "Did you read a report of the observations which the presiding judge made on your evidence?" He again said "Yes." And then the counsel stopped. I presume the circumstances of the trial were well known, and the counsel thought he had done enough. The defendant, the witness, expressed a desire to make a statement. The magistrate told him he could not hear it. Nevertheless the defendant persisted and made the statement, the subject-matter of this action of slander.

On the proof of these facts Lord Coleridge reserved leave to the defendant to move to enter judgment, if the Court should be of

1876

SEAMAN v. NETHERCLIFT.

opinion that there was no evidence on behalf of the plaintiff which ought to be left to the jury. It occurred to him, however, that it would be as well to take the opinion of the jury, and they found that the replication was true, viz. that the words were spoken not as a witness in the course of the inquiry, but maliciously for his own purpose, that is, with intent to injure the plaintiff. Upon these findings judgment was entered for the plaintiff, leave being again reserved to enter judgment for the defendant, and the Court of Common Pleas gave judgment for the defendant.

Now, if the findings of the jury had been founded upon evidence by which they could have been supported, I might have had some hesitation about the decision. But they were not; and we are asked to come to a conclusion contrary to what has been established law for nearly three centuries.

If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins* v. *Lord Rokeby* (1), after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough. (2) Or if a man when in the witness-box were to take advantage of his position to utter something having no refer-

(1) Law Rep. 7 H. L. 744. (2) *Trotman* v. *Dunn*, 4 Camp. 211.

ence to the cause or matter of inquiry in order to assail the character of another, as if he were asked: Were you at York on a certain day? and he were to answer: Yes, and A. B. picked my pocket there; it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege.

If, therefore, the findings of the jury, that the defendant had ceased to be a witness when he spoke the words, were justified by the evidence, I should hesitate before I decided in his favour. But I think the defendant was entitled to judgment on the first reservation. There was no evidence to go to the jury upon the plaintiff's case. What the defendant said was said in his character of witness; for there can be no doubt that the words were spoken in consequence of the question put to him by counsel for the prosecution, the object and effect of the cross-examination having been to damage his credibility as a witness before the magistrate, and of this the witness was conscious. The counsel, having put the question, stops; and if there had been counsel present for the prisoner who had re-examined the witness, he would have put the proper questions to rehabilitate him to the degree of credit to which he was entitled. That such questions would have been relevant I cannot bring myself for a moment to doubt, relating as they do to the credibility of the witness, which is part of the matter of which the magistrate has to take cognizance. That being so, the witness himself, who is sworn to speak the whole truth, is properly entitled, not only with a view to his own vindication, but in the interest of justice, to make such an observation in explanation of his former answer as is just and fair under the circumstances. That is what the defendant did. The sitting magistrate having allowed the disparaging question to be put and answered, ought not to have interfered to prevent the defendant from giving an explanation. I think the statement, coming immediately after the damaging question had been put to him, must be taken to be part of his testimony touching the matter in question, as it affects his credibility as a witness in the matter as to which he was called. It was given as part of his evidence before he had become divested of his character of witness; and but for the question of the opposite counsel he never would have made the statement at all.

1876

SEAMAN v. NETHERCLIFT.

As to the finding of malice, it is true that what the defendant said might possibly have the effect of damaging the plaintiff's character; but can any one suppose that the defendant had this in his mind when he spoke or that he intended to injure the plaintiff? He thought only of his own credit as a witness, which had been attacked. He spoke, on the impulse of the moment, no doubt very foolishly; and it was probably his foolish persistence in maintaining the same attitude and setting up his own opinion against the positive testimony of the other witnesses that prejudiced the jury against him, and led them to return the findings they did, founded, in reality, upon no evidence at all. In my opinion, the Lord Chief Justice should have nonsuited the plaintiff, which is the conclusion at which the Court of Common Pleas ultimately arrived; for there really was no evidence that the defendant was speaking otherwise than as a witness and relevantly to the matters in issue, because relevantly to his own character and credibility as a witness in the matter. That being so, even if express malice could have been properly inferred from the circumstances, the case of *Dawkins* v. *Lord Rokeby* (1) conclusively decides that malice has ceased to be an element in the consideration of such cases, unless it can be shewn that the statement was made not in the course of giving evidence, and therefore not in the character of a witness. A long series of authorities, from the time of Elizabeth to the present time, has established that the privilege of a witness while giving evidence is absolute and unqualified. *Allardice* v. *Robertson* (2) was relied upon by Mr. Chambers. That was the case of an action against a magistrate for words spoken on the bench, and Lord Wynford expressly distinguishes the two cases, and says that the privilege of a judge of the superior Courts does not apply to the judge of an inferior Court; and that in the case of the latter the privilege is not absolute and unqualified, and that a "subordinate judge" would be liable to an action if malice were proved. It does not, therefore, touch the present case; and as to a witness speaking with reference to the subject-matter of the issue, it is clear that the privilege is unqualified.

The judgment of the Common Pleas Division must, therefore, be affirmed.

(1) Law Rep. 7 H. L. 744.

(2) 1 Dow, (N.S.) 495, 515.

BRAMWELL, J.A. I am of the same opinion. The judgment of the Common Pleas affirmed two propositions. First, that what the defendant said was said as a witness, and was relevant to the inquiry before the magistrate; secondly, that, that being so, the Lord Chief Justice should have stopped the trial of the action by nonsuiting the plaintiff.

As to the first proposition, I am by no means sure that the word "relevant" is the best word that could be used; the phrases used by the Lord Chief Baron and the Lord Chancellor in *Dawkins* v. *Lord Rokeby* (1), would seem preferable, "having reference," or "made with reference to the inquiry." Now, were the judges of the Common Pleas Division right in holding that this statement of the defendant had reference to the inquiry? I think that they were. There can be no doubt that the question put by the cross-examining counsel ought not to have been allowed: "Have you read what Sir James Hannen is reported to have said as to your evidence in *Davies* v. *May?*" What Sir James Hannen had said in a former case was not evidence. It was, therefore, an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury. But the question having been put, and the answer having been in the affirmative—and the question being, as Lord Coleridge observed, "ingeniously suggestive," viz. that the way the defendant had been dealt with on the former occasion did not redound to his credit as a witness—the defendant insisted on making in addition the statement complained of. He did so, in my opinion, very foolishly. It would have been better to have been satisfied with retaining his own opinion without setting it up in direct opposition to the positive testimony of eyewitnesses. But he foolishly, as I think, and coarsely exclaimed, "I believe that will to be a rank forgery, and shall believe so to the day of my death." Suppose after he had said "yes," he had added in a decent and becoming manner, "and I am sorry Sir James Hannen said what he did, for I took great pains to form my own opinion, and I shall always retain it, as I still think it right." Would not that have had reference to the inquiry before the magistrate? And would it not have been reasonable and right that the witness should have added that

(1) Law Rep. 7 H. L. at p. 744.

1876

SEAMAN v. NETHERCLIFT.

statement in justification of himself? Surely, yes. Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, "that man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words "having reference to the inquiry" ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the first proposition is established, that the statement of the defendant was made as witness and had reference to the inquiry.

As to the second proposition, that, if the first be made out, no inquiry can be gone into as to whether the statement was false or malicious or as a volunteer, we are bound by authority. The case of *Dawkins* v. *Lord Rokeby* (1) is directly in point, and binding upon us even if we disliked the decision. Mr. Chambers has not attempted to distinguish that case except on the ground that the inquiry in that case was before a military court. But it is clearly not distinguishable on that ground. The learned Lords determined that what is true of a civil tribunal is true of a military court of inquiry; and they affirmed most distinctly the proposition that if the evidence has reference to the inquiry, the witness is absolutely privileged. There is also the case in the Court of Error of

(1) Law Rep. 7 H. L. 744.

*Henderson* v. *Broomhead* (1), which is precisely to the same effect, and undistinguishable from the present case.

I am, therefore, of opinion that the judgment of the Common Pleas Division was right, and must be affirmed.

AMPHLETT, J.A. I entirely concur with the reasoning and result to which the rest of the Court have come. There is here only one question open for the decision of the Court. How it would have been if this statement had been volunteered by the defendant, without it being necessary or in any way arising from questions he had been asked, we need not express any opinion. In such a case it may be that the words would not have been spoken in his office of a witness. I must by no means be taken as expressing an opinion that in such a case the witness would not be protected. I can see many reasons why a witness should be absolutely protected for anything he said in the witness box. If he did voluntarily make a scandalous attack while giving evidence, he would be guilty of a gross contempt of Court, and might be committed to prison by the presiding judge; or if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice. But this question does not arise here. I entirely agree that in this case the statement complained of was strictly relevant to the matter in issue; anything that tended to disparage the credit of a witness may be said to be relevant to the inquiry in which the witness is giving his evidence. When the defendant was asked as to his evidence in *Davies* v. *May*, with a view to disparage him as a witness, it was only just and right that he should be allowed to make any statement which he thought would justify his evidence, in fairness to himself, and as likely to conduce to the interests of justice. If the magistrate had stopped the previous question from being put, as he ought to have done, the statement would have been unnecessary; but the question having been allowed, so as to disparage the witness, the magistrate had no right to prevent him adding the additional statement in his own justification. No doubt the strong language the defendant used, which was quite unnecessary, prejudiced him

(1) 4 H. & N. 569; 28 L. J. (Ex.) 360.

1876

SEAMAN v. NETHERCLIFT.

with the jury; but the unnecessary strength of the language cannot affect the question of privilege. It is clear, therefore, that the case comes within the rule that has been laid down for two or three hundred years; and it is important that a rule so long established should be strictly adhered to, a rule which was established not for the benefit of witnesses, but for that of the public and the advancement of the administration of justice, to prevent witnesses from being deterred by the fear of having actions brought against them from coming forward and testifying to the truth. For these reasons, I concur that the judgment must be affirmed.

*Judgment affirmed.*

Solicitor for plaintiff: *Seaman.*

Solicitors for defendant: *Marsden & Son.*

---

*Jan.* 12.

DICKSON AND OTHERS *v.* REUTER'S TELEGRAPH COMPANY, LIMITED.

*Telegraph Company — Liability for Damages resulting from Misdelivery of a Telegram.*

No action will lie against a telegraph company at the suit of the *receiver* for the misdelivery of a telegram, unless there be either a contract between him and the company, or (possibly) fraud on their part in the transmission of it.

The plaintiffs were merchants at Valparaiso, being a branch house of a firm carrying on business under a different style at Liverpool. The defendants, a telegraph company, with its chief office in London, had agencies at Liverpool and elsewhere, including Monte Video, but not at Valparaiso. The defendants had a system of forwarding the messages of several senders in one "packed telegram," each message being distinguished by a cipher known to the defendants and their agents and to the senders, which messages on the receipt of the packed telegrams by the defendants' agents were transmitted to their proper recipients. In December, 1874, the plaintiffs, at Valparaiso, received a message transmitted by the defendants from Monte Video, purporting to be an order, which the plaintiffs executed, from the plaintiffs' Liverpool house for a large quantity of barley. No such message was in fact sent by the Liverpool firm, nor was the message intended for the plaintiffs. The misdelivery of the message was caused by the negligence of an agent of the defendants, and resulted in serious loss to the plaintiffs, in consequence of the fall in the market:—

*Held*, on demurrer, that, there being no contract between the plaintiffs and the defendants, and no duty owing by the latter to the former, there was no cause of action.

Affirmed 1 M.R.B.I. C.C.

STATEMENT OF CLAIM. 1. The plaintiffs are merchants carrying on business at Valparaiso under the style or firm of Dickson,

Bennett, & Co., and are a branch house of the firm of Dicksons, Robinson, & Co., of Liverpool.

2. The defendants are a telegraph company, having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. In December, 1874, the defendants had an agency at Monte Video, but not at Valparaiso.

3. Previous to December, 1874, the plaintiffs' Liverpool firm were in the habit of sending messages to the Valparaiso firm through the defendants' company, and were instructed by the defendants to head such messages by the registered cipher word "Felix," indicating that the messages were intended for the plaintiffs' Valparaiso firm. The plaintiffs' Liverpool firm accordingly so headed their messages, and still continue so to head them.

5. On the 26th of December, 1874, the plaintiffs received at Valparaiso a telegraphic message which had been transmitted by the defendants from Monte Video in the following words and figures:—"Dickson Bennett—Valparaiso—London—24—ship—distilling—barley—steamer—36—cost—freight—quarter—420—pounds—34—sailing—stop—nitrate—silver—5712—remit—Dickson—Liverpool—Havas—M. Video."

6. The signification of such message, when written at full length, was understood by the plaintiffs to be, and is, as follows:—"To Dickson, Bennett, & Co., Valparaiso; a message despatched from London the 24th instant:—Ship distilling barley by steamer at 36*s.* cost and freight per quarter of 420 lbs., or 34*s.* by sailing vessel. Stop purchases of nitrate: silver 57½ pence per ounce. Remit—From Dickson, Liverpool, through Havas, Monte Video.

7. Such message was not in fact sent to the plaintiffs by the Liverpool firm, nor was it intended for the plaintiffs. The misdelivery of the message was caused by the negligence of the defendants or their agents. (1)

8. On receiving the telegram, the plaintiffs supposed, and were

(1) The mistake arose in this way,—The cipher used by the Liverpool house of Dickson, Robinson, & Co., was "Felix," which, in the hurry of business, the agent of the defendants at Monte Video confounded with "Faber," the cipher used by the firm at Valparaiso for which the telegram in question was really intended.

1877

DICKSON v. REUTER'S TELEGRAPH COMPANY.

justified in supposing, that it contained the instructions of their Liverpool firm, and the plaintiffs thereupon proceeded to execute the order in the ordinary course of business.

9. On the 15th of February, 1875, the plaintiffs' Liverpool firm received a letter from their Valparaiso firm, advising a large shipment of barley. Inquiries were made, and the blunder of the defendants was discovered, and the plaintiffs' Liverpool firm lost no time in telegraphing to their Valparaiso firm to discontinue the shipments; but before the telegram reached them they had already completed several other purchases, which were forwarded to England.

10. There were three shipments of barley under the supposed instructions,—3299 bags were shipped per *Illimani*, S.S.; 2773 bags per *Cordillera*, S.S.; and 8540 sacks per *Zadok*.

11. In consequence of the fall of the market for barley, the plaintiffs have lost on the first shipment 687*l.* 17*s.* 1*d.*; on the the second shipment, 441*l.* 9*s.* 11*d.*; and on the third shipment 1481*l.* 17*s.* 8*d.*

The plaintiffs claimed 2611*l.* 4*s.* 8*d.* damages, with interest on that sum from the 24th of May, 1876, until payment.

The defendants demurred to the plaintiffs' statement of complaint, on the ground that it shewed no contract between the plaintiffs and the defendants, and no breach thereof, and did not, independently of contract, disclose any matter in respect of which any action can be maintained by the plaintiffs against the defendants, &c.

Joinder in demurrer.

Nov. 20, 1876. *Watkin Williams, Q.C.* (*H. D. Greene* with him), in support of the demurrer. There is no allegation in the statement of claim that the plaintiffs or their agents contracted with the defendants or with any agent of the defendants to forward the message in question, or that that which was done by the defendants was done falsely or maliciously, but merely that what occurred was the result of negligence or inadvertence of an employé of the defendants. The charge in effect amounts to this, and to this only, that the defendants (in Valparaiso) delivered to the plaintiffs a telegram which was intended for another firm at

that place. *Playford* v. *United Kingdom Electric Telegraph Co.* (1), is a distinct authority to shew that, in the absence of any contract between the plaintiffs and the defendants, or of the breach of some duty towards the plaintiffs at common law or by statute, or of some fraud or falsehood in the transaction, there is nothing to render the defendants liable to an action at the suit of the present plaintiffs.

*Herschell, Q.C.* (*W. H. Butler* with him), contrà. The plaintiffs in Valparaiso, through the negligence of a servant or agent of the defendants, received a message purporting to be sent to them from their Liverpool firm, upon which they acted and in consequence sustained a considerable loss. The message was false to the defendants' knowledge, in the sense that they had the means of discovering its falsity of which they did not avail themselves; and it was intended that the plaintiffs should act upon it. Further, the plaintiffs were induced to act on the message upon the representation of the defendants that they were authorized by Dickson, Bennett, & Co., of Liverpool, to send it, which brings the case within the principle laid down by the Court of Queen's Bench in *Collen* v. *Wright* (2), and by the Court of Common Pleas in *Randell* v. *Trimen* (3), and also in *Barwick* v. *English Joint Stock Bank.* (4) Moreover, the business carried on by the defendants being such that any negligence in the carrying it on is fraught with consequences so disastrous, there must of necessity be a duty cast upon them to conduct it with a due degree of care and attention. This is a duty which the defendants owe to all the world: see *Cornfoot* v. *Fowke* (5), and *Moens* v. *Hayworth.* (6)

[LORD COLERIDGE, C.J., referred to *Rawlings* v. *Bell* (7) and *Ormrod* v. *Huth.* (8)]

The fact that the defendants acted honestly makes no difference.

*Watkin Williams, Q.C.*, in reply. A party cannot be liable for injury arising from his negligence in doing an act which he is not

(1) Law Rep. 4 Q. B. 706.
(2) 7 E. & B. 301; 26 L. J. (Q.B.) 147; 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(3) 18 C. B. 786; 25 L. J. (C.P.) 307.
(4) Law Rep. 2 Ex. 259.
(5) 6 M. & W. 358.
(6) 10 M. & W. 147.
(7) 1 C. B. 951.
(8) 14 M. & W. 651.

1877

DICKSON v. REUTER'S TELEGRAPH COMPANY.

bound by some contract to do, or for the proper doing of which no duty is cast upon him by law. The defendants are no more responsible for the misdelivery of the telegram in question than a newspaper proprietor would be for a mistake in a quotation in a stock or share list. As to the suggestion that there is an implied warranty that the defendants were authorized by the Liverpool firm to deliver the message to the plaintiffs at Valparaiso, Willes, J., in *Collen* v. *Wright* (1), puts that upon a clear and intelligible foundation. "I am of opinion," he says, "that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized that the authority which he professes to have does in point of fact exist." The present case clearly does not fall within the principle thus laid down. It is difficult to appreciate the argument as to a supposed duty arising from the carrying on of the business in question.

*Cur. adv. vult.*

Jan. 13. The judgment of the Court (Lord Coleridge, C.J., and Denman, J.) was delivered by

DENMAN, J. This was a demurrer to a statement of claim which alleged in substance as follows:—The plaintiffs were merchants at Valparaiso, being a branch house of a firm carrying on business under a different style at Liverpool. The defendants, a telegraph company, with its chief office in London, had agencies at Liverpool and elsewhere, including Monte Video, but not at

(1) 8 E. & B. 657. 4 Jur. N.S. 358.

Valparaiso. The defendants had a system of forwarding the messages of several senders in one packed telegram, each message being distinguished by a cipher known to the defendants and their agents and to the senders, which messages on receipt of the packed telegrams by the defendants' agents were transmitted to their proper recipients. On the 26th of December, 1874, the plaintiffs, at Valparaiso, received a message transmitted by the defendants from Monte Video, purporting to be an order from the plaintiffs' Liverpool firm for a large shipment of barley. No such message was in fact sent by the Liverpool firm, nor was the telegram sent intended for the plaintiffs. The misdelivery of the message was caused by the negligence of the defendants or their agents, and resulted in serious loss to the plaintiffs, in consequence of the fall in the market for barley.

Under these circumstances, it was contended by Mr. Herschell, in a very able and ingenious argument, that the defendants were responsible. We took time to consider, owing to the importance of the case; but, after referring to the cases cited by Mr. Herschell, we come to the conclusion that the case is in effect governed by the decision of *Playford* v. *United Kingdom Electric Telegraph Co.* (1), and that our judgment must be for the defendants. In that case an action was brought against the telegraph company by the receiver of a telegraphic message in which by a mistake of the defendants' clerk an offer of 23*s.* per ton had been changed into an apparent offer of 27*s.* per ton. The senders of the telegram having refused to accept the goods except at 23*s.*, the intending vendors sued the telegraph company; but the Court of Queen's Bench held that, inasmuch as the only liability which could exist must be one arising out of some contract, and inasmuch as the only contract made by the company was one with the purchasers and not with the plaintiffs, the latter could have no right to recover against the defendants. Several American authorities were cited in support of the plaintiffs' claim in that case, which were to the effect that either a contract with or a duty towards the receiver of a telegraphic message arises from the relation between the parties or the nature of the business; but the Court of Queen's Bench declined to recognise those authorities (see the judgment,

(1) Law Rep. 4 Q. B. 706.

1877

DICKSON v. REUTER'S TELEGRAPH COMPANY.

p. 714), and held that the plaintiff, being a stranger to the contract with the company, could not maintain an action.

In the present case Mr. Herschell contended, first, that the defendants were liable because they had made a statement false to their knowledge, in the sense that they had the means of knowing its falsity, and that the plaintiffs, having acted on that statement to their loss, were entitled to recover damages. This appears to us to be equivalent to a contention that a telegraph company, having no contract with any individual except the sender, must be supposed to guarantee towards all mankind the accuracy and care of all their servants in all parts of the globe wherever they deliver a message, to such an extent at least as that if, through the negligence of any of their servants at any stage of the transmission, a message should be sent to the wrong person, that person, if he acted upon it to his detriment, would have an action. This seems to us to be a contention inconsistent with the law as laid down in *Rawlings* v. *Bell* (1), and approved of in *Ormrod* v. *Huth* (2), in the Exchequer Chamber, that, "an injury caused by a statement false in fact, but not so to the knowledge of the party making it or made with intent to deceive, will not support an action" (see 2 Smith's L. C. 7th ed. 87); nor do we think it would be reasonable to imply any such contract of indemnity from the nature of the dealing between the parties.

Mr. Herschell next contended that the defendants were liable upon a suggested analogy between this case and those of *Collen* v. *Wright* (3) and *Randell* v. *Trimen* (4); but we can see no real analogy between those cases and the present. Those cases only decided that, where an agent professes to have the authority of a principal to make a contract, having no such authority, he is liable to an action founded on his implied promise that he had the authority which he professed to have; in other words, that he was what he represented himself to be, viz. an agent having authority to contract as agent: see 2 Smith's L. C. 7th ed. 380. But it is impossible to say that a telegraph company makes any such profession or is an agent in any such sense, even where a message

(1) 1 C. B. 951.
(2) 14 M. & W. 651.
(3) 7 E. & B. 301; 8 E. & B. 647; 26 L. J. (Q.B.) 147; 27 L. J. (Q.B.) 215.
(4) 18 C. B. 786; 25 L. J. (C.P.) 307.

(3) & 2 Jur. N.S. 363; 4 W.R. 357

such as that in question is correctly forwarded. The telegraph company is at most a mere forwarder of messages, and is not bound to understand the object of the sender; and it would be wholly unreasonable to hold that, if the company forwarded a contract, by the mistake of a servant, for a larger price, when the sender only despatched a contract for a smaller, the company would be liable on the ground that it professed to be an agent authorized to make a contract either for the larger price, or at all. The company do not profess to carry on the business of agents to make contracts, any more than the post office. This argument, therefore, fails.

Mr. Herschell's third argument in favour of the liability of the defendants was substantially the same which prevailed in the American courts, but which was disposed of by the judgment in *Playford* v. *United Kingdom Electric Telegraph Co.* (1) It was to the effect that the business carried on by the defendants was of such a nature as to require extreme accuracy, and therefore to involve the necessity of such a liability as that contended for. This appears to us to be the same thing in other words as to say that a guarantee of accuracy is to be implied, at least so far as to give any one receiving a message a right of action if damaged by the receipt of an inaccurate message owing to any negligence of any servant of the company at any stage of the transit, even though the recipient be not a contracting party with the company. This would, in our opinion, be imposing a liability upon telegraph companies inconsistent with the real understanding of mankind as to the duties they undertake and the liabilities they incur, and practically extending the primary undertaking of the company with the sender of a message into an implied undertaking with all mankind, to guarantee every body against the consequences of the delivery of a message to the wrong party through any negligence of any one of their servants employed in the transmission of a message from the remotest part of the world. So to hold would, we think, be to overrule the limitation contained in the judgments above referred to in the cases of *Rawlings* v. *Bell* (2) and *Ormrod* v. *Huth* (3), and to impose a liability greater than any which the

(1) Law Rep. 4 Q. B. 706. (2) 1 C. B. 951.
(3) 14 M. & W. 651.

1877

DICKSON v. REUTER'S TELEGRAPH COMPANY.

law can imply either from the employment of the company or from the nature of the business carried on by them. It would also be inconsistent with the decisions in *Playford* v. *United Kingdom Electric Telegraph Co.* (1) and *Alton* v. *Midland Ry. Co.* (2), which confine the right of action for any injury resulting from a breach of duty arising out of a contract, to the party with whom the defendant contracts.

For these reasons, we are of opinion that the defendants are entitled to our judgment.

*Judgment for the defendants.*

Solicitors for plaintiffs: *Garnett, Tarbet, & Tinne, Liverpool.*
Solicitors for defendants: *Johnson, Upton, & Budd.*

---

*Jan.* 18.

[IN THE COURT OF APPEAL.]

FREDERICI *v.* VANDERZEE.

*Order XIV., Rule* 1—*Signing Judgment—No Defence—Affidavit by Plaintiff.*

2 QBD 536-7
CPD 429

An application under Order XIV., Rule 1, that the defendant may be called upon to shew cause why final judgment should not be signed, must be made on an affidavit that in the plaintiff's belief there is no defence to the action.

Per Grove and Denman, JJ. The affidavit must be made by the plaintiff himself; and

Per Cockburn, C.J. *Quære*, whether any one else can make such an affidavit.

THE writ of summons in this action was specially indorsed with the particulars of demand. The defendant appeared, and a summons was issued under Order XIV., Rule 1 (3), calling on the

(1) Law Rep. 4 Q. B. 706.

(2) 19 C. B. (N.S.) 213; 34 L. J. (C.P.) 292.

(3) Order XIV., Rule 1: "Where the defendant appears on a writ of summons specially indorsed, under Order III., Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the Court or judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as the Court or judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly."

defendant to shew cause why the plaintiff should not be at liberty to sign final judgment for the amount indorsed. In support of this summons the solicitor of the plaintiff made an affidavit setting out the facts on which the action was brought, and stating that the solicitor believed that the defendant had no defence to the action, and that the plaintiff was at Smyrna.

The summons came on before the master, who adjourned the hearing in order that the defendant might be able to file affidavits in answer, the master being of opinion that the affidavit, though not made by the plaintiff, was a sufficient compliance with the Order.

Against this decision of the master the defendant appealed to Lush, J., who dismissed the appeal, holding also that an affidavit by the plaintiff in person was not required by the Order.

The defendant then appealed to the Common Pleas Division.

Jan. 11. *J. C. Mathew*, for the defendant, cited *Christopherson* v. *Lotinga* (1) and *Herschfeld* v. *Clerk*. (2)

*C. S. C. Bowen*, for the plaintiff, cited *Kingsford* v. *Great Western Ry. Co.* (3)

GROVE, J. [After reading Order XIV., Rule 1.] The question here is whether an affidavit by the plaintiff's solicitor, verifying the cause of action, and stating that in his belief there is no defence, is under the Order a sufficient ground for calling on the defendant to shew cause why judgment should not be signed.

I am of opinion that it is not. The Order requires an affidavit by the plaintiff of his belief. There is good reason for this. It is one thing for the plaintiff, who may be presumed to have a knowledge of his rights, to make an affidavit, and another for his solicitor, or some other person, to do so; for if the solicitor's affidavit is sufficient, why not that of a managing clerk, or any clerk who happens to know anything of the business, and has a belief in the matter? It must be remembered that this is not a proceeding of common right, but is a summary proceeding of an exceptional character. A great privilege is given to the plaintiff in

(1) 15 C. B. (N.S.) 809; 33 L. J. (C.P.) 121. 10 Jur. N.S. 180

(2) 11 Ex. 712; 25 L. J. (Ex.) 113.

(3) 16 C. B. (N.S.) 761; 33 L. J. (C.P.) 307. 10 Jur. N.S. 804

1877

FREDERICI v. VANDERZEE.

order to forward the ends of justice in cases of an obviously undefended nature, but it is very reasonable that there should be the limit imposed that such a privilege shall be given only in cases where the plaintiff can himself pledge his belief.

It is true that inconveniences may arise by reason of this limitation, but they can go no further than that the plaintiff may be deprived of an especial privilege and be put to the pursuit of his remedy in the ordinary way. On the other hand, there might be very great inconveniences in consequence of the opposite construction of the Order. If an affidavit by the solicitor or his clerk were allowed to be sufficient, a door would be opened for very great laxity in the framing of these affidavits; the defendant might be himself out of the country, and on the affidavit of a person having very insufficient means of knowledge or judgment, and yet bonâ fide believing that there was a cause of action and no defence, final judgment might be signed against him. It seems to me that the balance of inconvenience would be on the side of the plaintiff's contention.

The subsequent part of the first rule affords an argument in favour of the view we take. The Court or a judge may order judgment unless the defendant, "by affidavit or otherwise, satisfy the Court or judge that he has a good defence to the action," &c. If the legislature had intended that the application might be founded not only on the plaintiff's affidavit, but on other matters, the words "or otherwise" would have appeared in that part of the order too. It is unnecessary at present to consider the case of a corporation, which may admit of different considerations. The decisions on the Common Law Procedure Act that have been cited, such as *Christopherson* v. *Lotinga* (1), seem quite to bear out the view we are taking.

DENMAN, J. I am of the same opinion. The 1st Rule of Order XIV. creates a new power in favour of plaintiffs who can state on their oaths that they believe the action to be undefended. This provision must be confined to the cases which the language is apt to meet, and it is quite beside the mark to speculate whether the legislature might advantageously have given wider powers.

(1) 15 C. B. (N.S.) 809; 33 L. J. (C.P.) 121.

We must construe the words as they stand, and, to my mind, they can only bear one meaning. The plaintiff is to swear to his belief. It would be doing the utmost violence to the language to make the affidavit of the solicitor sufficient.

---

The plaintiff appealed against the order of the Common Pleas Division.

*C. S. C. Bowen*, for the plaintiff. The question is, whether, under Order XIV., Rule 1, in order to call on the defendant to shew cause why judgment should not be signed, an affidavit by the plaintiff in person is absolutely necessary. Here the plaintiff is at Smyrna, and cannot make it.

[COCKBURN, C.J. The order says that the plaintiff must make an affidavit as to his belief. How can any one but the plaintiff himself swear as to his belief?]

It cannot be the intention of this order that, even if the defendant's affidavits admit the debt and the whole case, judgment cannot be signed because the plaintiff has not made an affidavit. How can a corporation make an affidavit? The word plaintiff in this order does not mean plaintiff in person, as it speaks of the plaintiff signing judgment, which he never does.

*J. C. Mathew*, for the defendant, was not called upon.

COCKBURN, C.J. It appears to me that the rule requires, before the defendant can be called upon to shew cause, an affidavit of the plaintiff's belief. It is not necessary for the present purpose to say whether any one else can make that affidavit, because there is here no affidavit as to the belief of the plaintiff, but only as to the belief of the solicitor. The summons, therefore, cannot be maintained.

BAGGALLAY, J.A. I entirely assent.

BRETT, J.A. I also assent. I wish to mention that in a case which came before us a short time ago (1) I used the words "crotchety technicality," and I am told that I have been sup-

(1) *Lloyd* v. *Lewis*, 2 Ex. D. 7.

1877

FREDERICI v. VANDERZEE.

posed to have used those words with respect to the decisions of some of the judges. I had no such intention, and what I said related to no particular person engaged in the case, but to crotchety persons who from time to time suggest technical subtleties in construing these rules. I said, speaking as of a rule of construction, that this Court ought to discourage these attempts, my notion being, that these rules should be construed broadly, so as to avoid technical difficulties. As to the case now under consideration, I was inclined, on reading the first rule, to hold that the affidavit might be made by some one other than the plaintiff, by some lawyer, for instance, who might be better acquainted with the business, but from the 3rd rule, which relates to the defendant and appears to provide clearly for an affidavit by the defendant in person, it seems to follow that, unless the plaintiff can make a similar affidavit, the action must go on in the usual course if the defendant chooses to persist.

*Appeal dismissed; no order made on the summons.*

Solicitors for plaintiff: *Freshfield & Williams.*
Solicitors for defendant: *Simpson & Cullingford.*

---

*Jan.* 18.

WARDEN, APPELLANT; TYE, RESPONDENT.

*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 13—"*Permits Drunkenness*"—*Licensed Person drunk on his own Premises.*

2 Q B D. 404

A licensed person cannot be convicted of permitting drunkenness under the 13th section of the Licensing Act, 1872, by reason of getting drunk on his own premises.

CASE stated by justices of Northampton, under 20 & 21 Vict. c. 43, upon a conviction by such justices.

The information was under s. 13 of 35 & 36 Vict. c. 94, against the appellant, an innkeeper, for permitting drunkenness to take place on his licensed premises.

The facts as stated shewed that on the occasion in question the appellant was drunk on his own premises.

The question for the Court was whether this amounted to

permitting drunkenness to take place on the premises within the section.

1877

WARDEN v. TYE.

*Poland*, for the appellant, contended that the words "permits drunkenness" in the 13th section of 35 & 36 Vict. c. 94 could not apply to the licensed person himself being drunk.

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. If by any reasonable interpretation of the language the section could be made to cover this case, it might be very desirable that it should, but I am clearly of opinion that the case is not within the section. If this conclusion appears absurd, the fault is not with those who have to interpret the Act. All the group of sections, of which s. 13 forms one, except the 12th, deal with what the licensed person is to do with regard to other persons' conduct. They do not relate to his conduct with reference to himself only. For instance, in this very 13th section the offence of permitting drunkenness is coupled with selling intoxicating liquors to drunken persons. The licensed person cannot sell intoxicating liquors to himself. It does not seem to me that, on any fair construction of the words, reading them by the light of the rest of the section and the surrounding provisions, they can be made to include the present case. I therefore come reluctantly, but clearly, to the conclusion that the conviction must be quashed.

GROVE, J. I am of the same opinion. I do not think any person reading the 13th section fairly could suppose that it was meant to apply to a case like this. The whole scope of its provisions is obviously directed to what the licensed person's conduct is to be with regard to other persons. There is another and a wholly distinct provision, viz. the 12th section, with regard to a person being drunk himself. We have to interpret the Act according to the fair meaning of its words, not to legislate; and whatever may be the gravity of the appellant's misconduct, we cannot strain the words of the Act to include it.

*Conviction quashed.*

Solicitor for appellant: *J. J. Rae, for Rawlins & Son.*

1877
*Jan.* 12.

## HIGGINSON *v.* SIMPSON.

*Contract—Agreement by Way of Wagering—*8 *&* 9 *Vict. c.* 109, *s.* 18.

The plaintiff was a "tipster," i.e., gave information as to the probable winners of horse races. Upon his giving the name of a horse to the defendant as the probable winner of a certain race, it was agreed between them that the plaintiff should have 2*l.* on the horse at 25 to 1, that is to say, that, if the defendant backed the horse and won, the plaintiff should have 50*l.* out of his winnings, but if the horse lost, the plaintiff should pay the defendant 2*l.*

The defendant did back the horse, and it won, and the plaintiff thereupon claimed 50*l.* out of the defendant's winnings:—

*Held*, that the agreement was void within 8 & 9 Vict. c. 109, s. 18, and that the 50*l.* could not be recovered.

*Beeston* v. *Beeston* (1 Ex. D. 13) distinguished.

This was an action in the Court of Passage at Liverpool, to recover a sum of 50*l.* alleged to be due under an agreement which the jury found to be to the effect hereafter stated. The plaintiff was what is called a "tipster," and had supplied the defendant with the name of a horse called Regal for the Grand National. It was then agreed between them that the plaintiff should have 2*l.* on Regal at 25 to 1 against the horse for that race, that is to say, that if the defendant backed Regal for the Grand National, and the horse won, the plaintiff was to have 50*l.* out of the defendant's winnings, but if the horse lost, the defendant was to pay the plaintiff 2*l.*

The defendant did back Regal, and the horse won. The defendant thereby won 250*l.*, and the plaintiff claimed out of his winnings 50*l.*

The verdict, on these facts, was entered for the plaintiff for the amount claimed, with leave to the defendant to move to enter it for himself, on the ground that the contract was void as being made by way of gaming or wagering.

An order nisi had been obtained accordingly, against which

Nov. 21. *Willis* shewed cause. The agreement was not void as being by way of gaming or wagering. It was not a case in which the plaintiff betted with the defendant on the horse. The substance of the transaction is this. The defendant being a man

of position, and having better opportunities of betting than the plaintiff, the plaintiff agrees to supply him with certain information, and in return is to be allowed to stand in with his bets on the horse named to the extent of 2*l*. To this extent the defendant betted on his behalf, and the losers having paid the money, the defendant is bound to pay it over to the plaintiff. The case of *Beeston* v. *Beeston* (1) is in the plaintiff's favour. [He also cited *Johnson* v. *Lansley*. (2)]

*French* supported the order. The distinction between the cases cited for the plaintiff and the present case is, that those were cases of money had and received where the particular money received by the defendant could be earmarked. They were cases of bets made specifically by the defendant on behalf of the plaintiff, and the defendant was held to be bound to account to the plaintiff in respect of moneys received under them. Here the finding is not that the plaintiff employed the defendant to make bets for him. It was a scheme to pay the plaintiff for the information given by him contingently on the winning of a particular horse. That is a contract by way of gaming or wagering. The case of *Beyer* v. *Adams* (3) is in favour of the defendant's contention.

*Cur. adv. vult.*

Jan. 12. The judgment of the Court (Grove and Denman, JJ.) was delivered by

DENMAN, J. In this case, heard before my brother Grove and myself, we took time in order to enable us to look into the cases cited, one of which had been so recently decided that we had not an opportunity during the argument of fully examining the report. A verdict had been entered for the plaintiff in the Court of Passage for 50*l*., with leave to the defendant to move to enter a verdict for him upon the findings of the jury. Those findings were as follows. That the plaintiff and defendant agreed together that the plaintiff, a professional betting man, was to lay out 2*l*. in betting on a horse called Regal for a particular steeplechase at the odds of 25 to 1 (i.e., taking those odds, or betting 1*l*. to 25*l*. on

(1) 1 Ex. D. 13. (2) 12 C. B. 468.
(3) 26 L. J. (Ch.) 841.

1877

HIGGINSON v. SIMPSON.

the horse). If Regal won, it was agreed that the plaintiff was to have 50*l.* from the defendant, to be paid out of the defendant's winnings if he (the defendant) backed Regal. If Regal lost, the plaintiff was to pay the defendant 2*l.* The defendant did back Regal, who won, and the defendant thereby won on bets which he had made on Regal, 250*l.* of which the plaintiff claimed 50*l.*

It was contended by Mr. French, for the defendant, that this transaction was "an agreement by way of gaming or wagering" within 8 & 9 Vict. c. 109, s. 18, and the action one "for recovering money won upon a wager" within the section. On the other side it was argued by Mr. Willis, for the plaintiff, that the real meaning of such a contract was merely that the defendant undertook to pay the plaintiff so much out of his winnings in case of Regal's success, by way of remuneration to the plaintiff for giving the defendant the benefit of his skill and information and experience in naming a probably successful horse. We can, however, only look at this contract as it appears upon the findings of the jury; and, so looked at, it appears to us to be clear that it is a contract by way of wagering, and nothing else. Even if the object of the defendant, in entering into such a bargain, were correctly surmised by the plaintiff's counsel, the ultimate effect of the bargain was to be wholly dependent upon the occurring of an event over which neither party had any control, and the action was one founded upon the supposed right to recover money won upon the happening of that event, viz. the winning, by a particular horse, of a particular race. This being so, we think it matters not that the bargain was complicated by a provision for other contingencies; as, for instance, that the defendant was only liable to pay the 50*l.* if he backed the particular horse and won upon him. The substance of the contract is always to be regarded, and we think that a contract such as this, however disguised, is in substance a contract by way of wagering. In *Grizewood* v. *Blane* (1) it was held that a contract was within the statute, though on the face of it it appeared to be a contract for the sale of shares, if it was in fact only intended that differences should be paid, and no shares really pass, and on the same principle, in *Rourke* v. *Short* (2) it was held

(1) 11 C. B. 538. (2) 5 E. & B. 904; 25 L. J. (Q.B.) 196.

that when a contract mainly depended upon a wager no action could be maintained upon it, even in an action for goods sold, when the parties had agreed that the price of the goods agreed to be sold by the plaintiff to the defendant should depend upon the result of such wager. The case of *Hill* v. *Fox* (1) was decided on the same principle, and is to the like effect. The cases cited by Mr. Willis on behalf of the plaintiff were none of them inconsistent with our decision. They were not cases of actions brought by one party to a wagering contract against the other for money alleged to be due under the contract. In the case of *Beeston* v. *Beeston* (2), which was the most relied upon, the Court only held that the plaintiff could recover on a cheque given by defendant to the plaintiff for the amount of moneys received by the defendant for winnings on bets made by the defendant with third persons, as agent for the plaintiff. This was held not to be the case of an action upon a contract by way of wagering, but of one brought upon a cheque given for money received by the defendant for which he was liable to account to the plaintiff. *Johnson* v. *Lansley* (3) was a similar case, and is no authority for the plaintiff in the present case, who sues upon the contract itself. We are of opinion that the order must be made absolute to enter judgment for the defendant with costs.

*Order absolute.*

Solicitors for plaintiff: *Torr & Co., for Hughes.*

Solicitors for defendant: *Vizard, Crowther, & Co., for Lynch & Teebay.*

(1) 4 H. & N. 359. (2) 1 Ex. D. 13. (3) 12 C. B. 468.

(1877) 2 C. P. D. 80. NORRIS v. BEAZLEY. | Distinguished. DOLLFUS MIEG ET CIE. v. BANK OF ENGLAND [1951] 1 Ch. 33

1877
Jan. 12.

## NORRIS AND ANOTHER *v.* BEAZLEY.

*Practice—Adding Defendant—Order XVI., Rule 13—"Questions involved in the Action"—Order II., Rule 6—Bills of Exchange Act.*

In an action on a bill of exchange against the acceptor, the defendant sought to add the name of a company as defendants under Order XVI., Rule 13, upon the following grounds:—It was alleged by the defendant that the acceptance was given for the purchase-money of a ship which he had agreed to purchase of the plaintiffs; that in entering into the agreement for such purchase he had acted as a trustee for the company, to whom the ship was afterwards conveyed in pursuance of the agreement, and that the plaintiffs made fraudulent representations with regard to the ship, by reason of which the company had been put to useless expense, which they claimed to recover from the plaintiffs.

The Court refused the application.

Per Lord Coleridge, C.J., and Grove, J., the case was not one to which the 13th Rule of Order XVI. applied.

Effect of Order II., Rule 6, which continues the procedure under the Bills of Exchange Act, considered.

THE statement of claim stated as follows. The plaintiffs were shipbrokers, carrying on business in London, and the defendant was secretary to a company called the Niger Merchants Company, Limited. The action was brought to recover the sum of 500*l.* due on the defendant's acceptance, and also for money payable upon the consideration for the same. The plaintiffs and the defendant had entered into an agreement for the sale of a ship called the *Marie* by plaintiffs to defendant for 3500*l.*, whereof 500*l.* was to be paid by draft at three months' date with approved guarantee. The acceptance for 500*l.* now sued upon had been given in accordance with this agreement.

The statement of defence stated that the defendant had entered into the agreement for the purchase of the ship on behalf of himself and the other members of the Niger Merchants Company, Limited, and that the defendant was induced to enter into the said agreement by fraudulent misrepresentation and concealment on the part of the plaintiffs with regard to the ship in various particulars set out in the defence. The defendant also made a counter-claim for damages in respect of the alleged fraud of the plaintiffs, stating that he and the Niger Merchants Company had incurred great expenses by reason of the plaintiffs' misstatements with regard to the ship.

The defendant's affidavit stated that he had entered into the agreement mentioned in the pleadings as agent on behalf of himself and others forming the company called the Niger Merchants Company, Limited, and the said steamship was conveyed over by the plaintiffs, not to him, but to the company, in its own name. He also stated that he held certain shares in the company, and was the secretary thereof, but the company was liable to find funds in respect of the purchase-money of the ship and the acceptance sued upon.

It appeared that at the time when the agreement for the sale of the ship took place the company was only in the process of formation, and was not registered till afterwards.

The writ had been issued under the Bills of Exchange Act.

The defendant applied to Grove, J., at chambers, under Order XVI., Rule 13, to add the Niger Merchants Company as defendants in the action. The learned judge refused the application.

Against his decision the defendant appealed.

*Crump* moved to rescind the judge's order dismissing the application.

[DENMAN, J., referred to the case of *Pollock* v. *Campbell*. (1)]

It is clear that under Order II., Rule 6, so far as the proceedings are under the Bills of Exchange Act, they must be in the form directed by that Act, but when once leave to appear has been granted the proceedings are the same as in any other action, and must be governed by the Judicature Act and Rules.

It is contended that the defendant being only a nominal defendant, and the Niger Merchants Company being the real defendants, they ought to be made parties to the action. The company have a large claim against the plaintiffs for misrepresentation arising out of the very same transaction, and which, if the company had themselves been the nominal as well as the real purchasers of the ship, would have been a defence to the action. It was clearly intended by the Judicature Act that, in such a case as this, all questions really at issue should be settled in one action, and all the parties brought before the Court at once, so as to

(1) 1 Ex. D. 50.

1877

NORRIS v. BEAZLEY.

avoid the unnecessary expense and delay of a multiplicity of actions arising out of the same transaction, all involving the same matters. The words of the 13th Rule of Order XVI., include the present case.

*W. A. Lewis* shewed cause. The 13th Rule does not include this case. It is quite obvious from the two last sentences of the rule that it only includes cases where the plaintiff has a right to proceed against the defendant to be added, and it must be a right "involved in the action."

The plaintiff here claims no right of action against the Niger Merchants Company, and, in fact, it is clear that he has none. When a third person is to be brought in on the ground that some question of indemnity may arise between the defendant and such person, another set of provisions altogether applies. If there is any real ground of defence, the defendant can avail himself of it in the present state of the record. With regard to the counter-claim, which it is alleged the company has, the mere fact that if a party is added as defendant, he would have a counter-claim, is clearly no ground under the act for adding him. The plaintiff, by the Bills of Exchange Act, is precluded from setting up any other claim than that on the bill of exchange, and the consideration for it; it would be most unfair that he should be met by a counter-claim, involving all manner of other matters, by a defendant against whom he could not in the action make any claim.

*Crump*, in reply, referred to Order XVI., Rule 15.

LORD COLERIDGE, C.J. This is an application on the part of the defendant to add another party as defendant to the record. The case appears to be of this sort. The action is on a bill of exchange, of which the defendant is acceptor. The defendant pleads, among other things, that he was induced to sign by fraud. He says that the bill was given in part payment for a ship bought by him, and that he contracted to purchase the ship on behalf of a company not then fully constituted, but which afterwards became so, called the Niger Merchants Company, Limited, and that this company has a cause of action against the plaintiffs for fraud, and that on that ground there is a good counter-claim. The defendant now moves this Court on appeal from

chambers to add the Niger Merchants Company as defendants, and it would appear that the company is willing to be added. Many points have been raised, some of which it is not necessary to decide. It has been objected that this is matter of procedure, and that the 6th Rule of Order II. prevents the Judicature Act having any application to the case of an action on a bill of exchange within that rule. If it was necessary to decide the point, I should be disposed to assent to the arguments of the defendant's counsel, and to think that this is not so. But in my opinion we are not called upon to decide this point. The question arises whether this is a case in which, under the 13th Rule of Order XVI., the Court can and will accede to the application. Now, but for the last two clauses of the rule, I should, speaking for myself, have been very much disposed to accede to the application, because, as I understand it, this is the sort of case set up. It is said that the present defendant is a nominal defendant; that the Niger Merchants Company, the parties really interested, have a large claim against the plaintiffs in respect of a matter including this 500*l.* bill sued upon, which, if the action were against the company, would be an answer to it, and that the defendant is, in truth, merely a trustee for the company. I should have thought, if the matter stood on the earlier part of the rule alone, that it was under those circumstances reasonably necessary, in order to enable the Court effectually and completely to settle the questions involved, to bring the Niger Merchants Company before the Court. But the plaintiffs' counsel has directed our attention to the subsequent portions of the rule. It is provided that "no person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto." Now, this, although it is not a case of making a person a plaintiff against his will, is certainly the case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be plaintiff without his consent, but the succeeding words are stronger. "All parties whose names are so added as defendants shall be served with a summons, &c., and the proceedings against them shall be deemed to have begun only on the service of such summons." It seems to me to be correctly argued that those words plainly imply that

1877

NORRIS v. BEAZLEY.

the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. It seems to me that this application is answered, and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant between whom and the company there may be questions which will afterwards have to be settled. It seems to me that it is the more important to construe this rule strictly, because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights, as against one person, with questions of a highly complicated nature arising between themselves and others.

DENMAN, J. I am of the same opinion. With regard to the question as to the applicability of the rules under the Judicature Act to an action commenced under the Bills of Exchange Act, it is not, I think, necessary to pronounce any judgment; but if it were, I should be disposed to come to the conclusion that the defendant's counsel was right in contending that the application of Rule 6 of Order II., which continues the procedure as it was under the Bills of Exchange Act, must be confined to that part of the procedure which is within the special purview of that Act as distinguished from the ordinary proceedings in the action. The case of *Pollock* v. *Campbell* (1) is not an authority to the contrary, for in that case the plaintiff sought to sign final judgment under the Bills of Exchange Act, and consequently, it was held that Order IX., Rules 2 and 6, did not apply. But when leave to appear has been given in an action under the Bills of Exchange Act, the part of the procedure to which that Act applies is concluded, and the cause proceeds in the ordinary way.

The question we have to decide turns upon the 13th rule of Order XVI. I am not prepared to say that that rule is to be con-

(1) 1 Ex. D. 50.

fined to cases in which, the plaintiff having made a particular claim and stated a particular cause of action, the person sought to be introduced is a person who is affected by, and who ought to be included in, that claim. I think there may be cases where, though a person is not within the scope of the plaintiff's attack in the first instance, he ought to be introduced as a defendant to enable the Court to settle all the questions involved in the action. I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed, unless a very strong case is made out, shewing that in the particular case justice cannot be done without his being brought in.

I do not think such a case is made out here. The plaintiffs sue on a bill of exchange, and have a clear primâ facie case, the defendant not denying that he accepted the bill; but the defendant alleges that he accepted the bill by way of payment for a ship, and that the acceptance was obtained from him in the course of a transaction that was fraudulent as against certain persons. That may or may not be true, but I should decline to assume it to be true on mere statements contained in affidavits or pleadings. If it be true, I am not sure that the defendant might not on his counter-claim recover damages against the plaintiffs as a trustee for the company, and if so, complete justice would be done. But in any case, I do not think it would be right on such a statement of facts as we have before us, to hamper the plaintiffs, in prosecuting the claim which they primâ facie undoubtedly have upon this bill of exchange, by forcing them to proceed against other defendants whom they do not desire to join. I am not prepared to disagree with the view expressed by my Lord, as to the limited effect of the 13th Rule of Order XVI., but I prefer not to decide on that ground, because it seems to me that, apart from such a limited construction of the rule, we ought not to act upon it by adding a defendant without the consent of the plaintiff, except in cases where it is clearly made out that it is necessary to do so. I do not think that the present is such a case.

GROVE, J. I am of the same opinion. The view I take of the 13th rule of Order XVI. is that its main object was to enable

1877

NORRIS v. BEAZLEY.

either a plaintiff or a defendant to be struck out or added when in the course of an action it appears that this is necessary, in order to do justice and settle all the questions involved in the action. There was considerable doubt in many cases, e.g. *Blake* v. *Done* (1), under the Common Law Procedure Act, as to the extent of the power given by that Act with regard to the alteration of the parties to actions, as, for instance, as to the power to substitute one plaintiff for another, and so forth, and it was therefore very desirable to set forth the power of the Court in regard to such matters more precisely. My impression of the meaning of the rule is that it was intended to enlarge the power given by the Common Law Procedure Act in such cases, and to enable the Court, when the claim or the defence would be prejudiced by the absence of a party, to add such party at any stage on such terms as the Court may think fit. But the power is limited by the order to cases where the addition of a party is necessary to enable the Court to adjudicate upon and settle "all questions involved in the action." The term "involved" is, no doubt, somewhat elastic. It might be so construed as to include a great number of subsidiary or collateral rights. It is difficult to define the meaning, but there must be some reasonable limit, and I am of opinion that the present case is not within such limit. The plaintiff here has a primâ facie right of action on a bill of exchange, and I do not think that the right sought to be set up on the part of the Niger Merchants Company can be fairly said to be involved in that action. It may be involved in the sense that upon the recovery in the present action there might be rights over as between the parties, but if a party is always to be added, because in certain contingencies a verdict one way or the other may give claims over, a very wide field indeed is opened. It seems to me that so great an extension of the objects of the rule would be very far from beneficial, and would lead to great confusion and embarrassment. I should be inclined to adopt the view taken by my Lord as to the meaning of the section, but I go further, and think that we should refuse this application, on the ground that a sufficient primâ facie case has not been made out of any question which, in any reasonable sense of the terms, is involved in the present action.

(1) 7 H. & N. 465; 31 L. J. (Ex.) 100.

There appears here to have been a contract made with the defendant and not with the company. The ship was, it is true, afterwards conveyed to the company, but the contract for sale was made with the defendant, and in pursuance of that contract the defendant gave the acceptance now sued on. It seems to me a very formidable suggestion that when a contract has been made with one party, and the seller elects to take the responsibility of that party, and receives his acceptance for the purchase-money, he is to be liable at any moment on a mere affidavit to have, instead of a simple action on such acceptance, an action complicated with the rights of third persons brought into the action against his will. Every question which to my mind can fairly be said to be involved in this action can, it appears to me, be raised without the addition of the company as defendants. It is argued that the company has a counter-claim. I do not see that that is a reason for bringing them in. The counter-claim allowed by the Judicature Act is the counter-claim of the defendant to the action, not a claim of third parties. For these reasons it does not seem to me that the case is fairly within the section, and that the rule should therefore be refused.

LORD COLERIDGE, C.J. I wish to guard against being supposed by anything I have said to have meant that a defendant could never be added at the instance of the defendant. Such was not my meaning. I agree with what Archibald, J., so well said in *Edwards* v. *Lowther* (1), viz. "that all parties against whom remedy or relief is sought should if possible be joined in the same action."

*Rule refused.*

Solicitors for plaintiffs: *Trinders & Curtis Hayward.*
Solicitors for defendant: *Brook & Chapman.*

(1) 45 L. J. (C.P.) 419.

1876
*Dec.* 16.

[IN THE COURT OF APPEAL.]

BURCHELL *v.* CLARK.

*Construction of Deed—Lease and Counterpart, Discrepancy between—Clerical Error in Lease.*

By an indenture of lease dated in 1784 and executed by the lessor, he demised certain premises to hold to the lessee and his assigns for the term of ninety-*four* and a quarter years, yielding and paying therefor during the said term of ninety-*one* and a quarter years hereby demised a yearly rent. The number of years was not mentioned in any other clause of the lease. But the counterpart, executed by the lessee, which was otherwise identical with the lease, had ninety-one in the habendum as well as in the reddendum. In an action by the assignee of the reversion to recover possession against the assignee of the lessee after the lapse of the ninety-one and a quarter years:—

*Held*, overruling the judgment of the Common Pleas Division (by Cockburn, C.J., and Bramwell and Amphlett, JJ.A.; Kelly, C.B., dissenting), that, there being a manifest clerical error in the lease, the counterpart might be looked at to ascertain where the mistake lay, and that, on the true construction of the lease and counterpart taken together, the "ninety-four" in the lease must be rejected, and the lease read as a grant for ninety-one and a quarter years only.

APPEAL from the judgment of the Common Pleas Division in favour of the defendant on a special case. (1)

The action was to recover possession of three houses in the Euston Road by the assignee of the reversion against the assignee of a lease granted in 1784 by Henry Penton, the then owner in fee, to one Samuel Coney.

The indenture of lease was dated the 3rd of September, 1784, and was executed by the lessor only.

There were no recitals, but the indenture witnessed, that in consideration of the surrender of a former lease granted by the lessor to the lessee, and of the buildings erected by the lessee upon the ground, and of the yearly rent to be paid and covenants in the indenture by the lessee to be observed, H. Penton "doth demise, &c., unto the said S. Coney all that piece of ground situate," &c. "To have and to hold the said piece of ground, &c., unto the said S. Coney, his executors, administrators, and assigns, from the feast-day of St. John the Baptist last past before the date hereof, for and

(1) 1 C. P. D. 602.

during and unto the full end and term of ninety-*four* years and one quarter of a year from thence next ensuing, and fully to be complete and ended. Yielding and paying therefor yearly, and every year during the said term of ninety-*one* years and one quarter of a year hereby demised unto the said H. Penton his heirs and assigns, the yearly rent or sum of 3*l*."

The number of years was not mentioned in any other clause of the indenture, but in the covenants to pay rent, &c., and in the proviso for re-entry at the end or other sooner determination of the lease, the phrase was "the said term hereby demised."

The counterpart, which was executed by the lessee only, was identical with the lease, except that "ninety-one" years occurred in the habendum as well as in the reddendum.

There were some other facts stated in the case as set out in the report in the Court below, which it is unnecessary to give.

The Common Pleas Division held that the habendum in the lease must govern, that the lease was therefore for ninety-four and a quarter years; and that the defendant was entitled to judgment.

On appeal.

Dec. 15. *Finlay*, and *G. R. Kennedy*, for the plaintiff. The Court below gave too much weight to the lease as distinguished from the counterpart. The two are in effect but one deed, and the one part may be used to correct an obvious mistake in the other. The counterpart, for many purposes, is primary evidence against the lessee: *Houghton* v. *Kœnig* (1); *Roe* v. *Davis*. (2) When there is an obvious mistake, even in the most operative part of a deed, a court of law will correct the mistake, that is, will read or construe the deed as if the mistake were corrected. In *Wilson* v. *Wilson* (3), in articles of separation between husband and wife the name of the husband appeared as the person against whose debts the trustees were to give the husband an indemnity, and the House of Lords held that the deed must be read as if the name of the wife were there. And Lord St. Leonards observed that it was a great mistake to suppose that even a court of law could

(1) 18 C. B. 235; 25 L. J. (C.P.) 218.
(2) 7 East, 363.
(3) 5 H. L. C. 40, 66; 23 L. J. (Ch.) 697, 703.

1876

BURCHELL v. CLARK.

not correct a mistake or error on the face of an instrument. If an undoubted mistake was clearly pointed out on the face of an instrument, both courts of law and equity, without at all going into parol evidence upon it might correct it. And he instanced an anonymous case cited by Buller, J., in *Bache* v. *Proctor* (1), in which the Court of Common Pleas had enforced a bond for the non-payment of money, although the defeasance of the bond was if the obligor did *not* pay the money, but the Court said the word "not" was clearly a blunder, and read the instrument as if it were not there. Again, in *Spyve* v. *Topham* (2), where the lease was to the trustee and the release granted the premises to the cestui que trust, to hold to the trustee, the grant to the cestui que trust was rejected as a mistake. *Morton* v. *Woods* (3) is also a case in which the Exchequer Chamber looked at the intention rather than the words used.

A passage from Sheppard's Touchstone, p. 52, was cited and relied on by Archibald, J., in the Court below, that in case of difference the counterpart must be made to agree with the lease, which is the principal; but that is when the difference is between the lease, consistent in itself, and the counterpart, not when the discrepancy between the two arises from the lease having two inconsistent clauses. Indeed, unless so limited, that passage in Sheppard's Touchstone is not to be reconciled with other passages. Thus at p. 52 it is said: "All the parts of a deed indented in judgment of law do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party. And albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they do more properly belong to him; for every word that is doubtful shall be applied and expounded to be spoken by him to whom they will best agree, according to the intent of the parties, and they shall not be taken more strongly against one, or beneficially for the other, as the words of a deed-poll shall." This shews that in such a case as the present the lease

(1) 1 Doug. at p. 384. (2) 3 East, 115.
(3) Law Rep. 4 Q. B. 293.

and counterpart must be treated as of equal value, and if so, there cannot be a doubt that the term in the habendum in the lease must be rejected. Again, the 4th rule of construction given in Shep. Touch., p. 87, is: "That the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein. Ex antecedentibus et consequentibus est optima interpretatio: for Turpis est pars quæ cum suo toto non convenit. Maledicta expositio quæ corrumpit textum."

Dec. 16. *Benjamin, Q.C.*, and *J. Graham*, for the defendant. The lessor is bound by the deed which he has executed; and he cannot now be permitted to aver or prove anything against it: 2 Bl. Com. p. 295. What, therefore, is the construction of the lease taken by itself? Clearly it must be construed as a grant for ninety-four and a quarter years. In Shep. Touch. p. 53, "Although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, the other is not but a counterpart. And therefore if the lessor only seal, and not the lessee, yet it is as good [to bind him] as if both sealed [and frequently a grantee may be bound by acceptance, as an estoppel, 1 Inst. 143a]; and if there be any difference between the parts, the counterpart shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk."

[AMPHLETT, J.A. The author is speaking of a case where the lease or the principal is consistent with itself.]

The sixth and seventh rules of construction given in Sheppard, p. 88, are: "6. That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party . . ." "7. That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary; and therefore herein a deed doth differ from a will." And Blackstone (2 Com. p. 381) adopts that language. In Shep. Touch. p. 75, it is said: "The habendum doth properly succeed the premises. . . . And the office hereof is to set down again the name of the grantee, the estate

1876

BURCHELL v. CLARK.

that is to be made and limited, or the time that the grantee shall have in this thing granted or demised, and to what use."

[COCKBURN, C.J. In Shep. Touch. at p. 52, a similar description of the habendum occurs, and Preston inserts "[which is a formal and not an essential part of a deed]." And in Smith's Landlord and Tenant, pp. 103–4, it is said: "It is often said by our text-writers that the habendum in a deed may limit and ascertain the extent of general words used in the premises, but cannot contradict or destroy them: thus, for instance, if in the premises A. were to demise to B. for ninety-nine years habendum to him for twenty-one years, the habendum would be void, and the lessee would take for ninety-nine years:" citing Plowd. 153. The habendum, therefore, is not the chief part of the deed.]

It is to be observed that there are no proper "premises" in this deed. Consequently the habendum is the all-important and only operative part of the deed. It is said that the reddendum is inconsistent, but that inconsistency is taken away by the covenant to pay the rent, which is "during the term hereby demised," that is, ninety-four years and a quarter.

[BRAMWELL, J.A. The lessee has only executed a deed binding himself for ninety-one years and a quarter. In *Pearse* v. *Morrice* (1) the counterpart was held to be "the indenture of demise" as against the lessee.]

*Finlay*, in reply, referred to Rules of Construction 1 and 2 in Shep. Touch. p. 86, and to the judgment of Bayley, B., in *Strickland* v. *Maxwell* (2), where he says: "The habendum is the proper place to look to for the purpose of ascertaining what period the parties had in their contemplation in making a lease, because it is generally the office of that part of the deed to fix the time during which the lessor grants that the lessee shall enjoy the demised premises. I agree that you may look at other parts of the instrument, and that if you can see clearly that it must have been the intention of the parties that the lease should endure for a longer period of time than the habendum specifies, the other part of the lease may control the habendum; but then it must be clear from those other parts of the lease that it could not have been the intention of the parties that the habendum should

(1) 3 B. & Ad. 396. (2) 2 Cr. & M. at p. 549.

operate according to the words. It must, however, be a strong case, and quite clear that it could not be the intention of the parties that he should hold for the term specified in the habendum." Nothing can be clearer in the present case, looking at the lease and counterpart as one instrument, than that the parties did not intend that the lessee should hold for the term of ninety-four and a quarter years specified in the habendum of the lease.

COCKBURN, C.J. The case has been so fully argued, and the point moreover lies in so small a compass, that I think we are in a position to pronounce judgment at once, although the Court is not unanimous. In my opinion the decision of the Common Pleas Division ought to be reversed. In the view I take, I am very clearly of opinion that it is not necessary to overrule any of the canons of construction which have been relied on by the defendant's counsel. I confess that I am not a great admirer of canons of construction. They were framed with a view to general results, but are sometimes productive of injustice by leading to results contrary to the intentions of the parties; but still in a case to which they clearly applied we should hold ourselves bound by them. And I am glad to think that in the present instance we can decide the question before us in accordance with the real justice of the case, without violating any of the canons of construction which have been generally adopted. It is perfectly clear that in the deed executed by the lessor there is some clerical error: for the habendum is for ninety-four and a quarter years, while the reddendum is for "the said term of ninety-one and a quarter years." Either, therefore, the ninety-four ought to be ninety-one, or the ninety-one ought to be ninety-four. There was a counterpart executed by the lessee at the same time that the lease was executed by the lessor, and the question is whether we can refer to the counterpart in order to see which is the error in the lease. I quite agree that, if there were only one deed, the habendum would be the dominant part, and must prevail, and the reddendum would be subordinate, and must yield, if there were any inconsistency between the two. I agree, also, if there were an inconsistency between the lease and the counterpart, if it were clear that a mistake had been made in not making the counterpart and

1876

BURCHELL v. CLARK.

lease correspond, according to the canon of construction laid down in Sheppard's Touchstone, the counterpart must give way, being the inferior instrument, and the lease, which is the superior instrument, must prevail. But here the difference is not between the lease and counterpart independently of any inconsistency in the lease itself. Here the lease executed by the lessor contains a palpable mistake, and the canon of construction does not exclude us from looking to see where the mistake lies by referring to the counterpart. There is nothing in the canons of construction to shew that the lease and counterpart may not be treated as one common instrument, and consequently I can see no reason in common sense, and I find no authority, why we should not ascertain where the manifest error lies. And when we find a manifest discrepancy between the habendum and reddendum in the lease, but no such discrepancy in the counterpart, the habendum and reddendum in the latter being for the same term of years, and when we consider that the counterpart was the deed which the lessor accepted from the lessee, we may well resort to the counterpart to see how the discrepancy between the habendum and the reddendum in the lease itself is to be solved.

If from any other part of the deed we could solve the difficulty, and come to the conclusion that the "ninety-four" was inserted by mistake, we should clearly be at liberty to do so. If, for instance, in the covenant to pay rent the covenant, instead of being to pay during the said term, had been to pay during "the said term hereby demised of ninety-one and a quarter years," it would be clear that the mistake lay in the habendum, and the mistake would be corrected by the deed itself. In like manner if we are to treat the two instruments as relating to one common transaction, I can see no reason why we should not correct the palpable mistake in the lease by reference to the counterpart, just as well as by reference to other parts of the very same deed. If, again, in what are called the "premises" the number ninety-one had occurred, the mistake in the habendum would have been corrected, just as by the covenant to pay rent; and so by reference to the counterpart, in which there is no discrepancy, we may ascertain where the mistake lies. I see no reason in the world why we should not resort to the counterpart, and by so doing in effect

reform the lease according as justice requires by giving to it the interpretation which, beyond all question, if it had been correctly drawn according to the intention of the parties, it must have had.

I am of opinion, therefore, that the judgment must be reversed, and judgment entered for the plaintiff.

KELLY, C.B. I have the greatest difficulty in dealing with this case, because I cannot doubt that the real intention of the parties was that the lease should be for ninety-one years and a quarter, and not for ninety-four years and a quarter; but on reference to the canons of construction, which have been adopted by the very highest authority, and applying them to the present case, I cannot see how any other construction can be arrived at than that the lease is a grant of a term of ninety-four years and a quarter, and not of ninety-one years and a quarter only. I agree that we must look at the counterpart as well as the lease, but looking at the two instruments it is at once apparent that while the lease purports to be a grant for ninety-four and a quarter years, the counterpart only shews a term for ninety-one and a quarter years, the two instruments are thus inconsistent, and when that is the case, on the true rule of construction, the counterpart must yield to the lease itself. That is not only the effect of the rules of construction, but no authority to the contrary has been cited to shew that where the two instruments are absolutely inconsistent, the lease must not prevail, or be sacrificed to the counterpart. Again, it is laid down that if by means of the habendum, or by the operative part, or the premises, as it is called, a term, say of ninety-four years, is expressly granted, and in a subsequent part of the deed a shorter term is referred to, the former part must prevail. This principle is so clearly established that it is admitted, in the present case, that if the lease is to be taken by itself it must be interpreted as a grant of ninety-four and a quarter years. If that be so, what difference can it make, if we refer to the counterpart and find that it is inconsistent with the lease? The counterpart must give way. I do not say, if the canons of construction were not such as I suppose them to be, and the two instruments could be taken together as of equal avail, that this

1876

BURCHELL v. CLARK.

would be the construction. But a mistake has been made in the lease. By the rules of construction that mistake must be taken to be in the second clause, referring as it does to the term hereby demised of ninety-one and a quarter years, whereas there had immediately before been an express grant of a term of ninety-four and a quarter years. The counterpart, I do not deny, if taken alone would go to shew that the grant was for ninety-one and a quarter years; but still, I do not think, according to the rules, that it is sufficient to override the lease, and it would in effect be allowing the counterpart to set aside the absolute grant of ninety-four and a quarter years. And I can find no authority for saying this can be done. I am extremely reluctant to differ from the other members of the Court; and I am glad that they can see their way to an opposite conclusion, as their judgment will prevail, which I think is to do justice, by carrying out the intention of the parties.

AMPHLETT, J.A. My Brother Bramwell, who was obliged to leave the Court, has desired me to read the following note of his judgment: "I am of the same opinion, for the reasons given by the Lord Chief Justice. I am of opinion that there was no term granted and accepted for more than ninety-one and a quarter years. It is manifest to me that no action of covenant could be maintained for breach of covenant after the ninety-one and a quarter years, and consequently that the term is of no greater length."

I am also myself of the same opinion. What is the real construction of these two documents as they stand? According to one of the canons in Sheppard's Touchstone, p. 52, the lease and counterpart are really but one document. Formerly they used to be written on one piece of paper or parchment. They are still but one deed, and we have a right to look at both to ascertain the construction. We start with this, that both parties considered and intended that the lease and counterpart should be identical. We look at the lease, and find it inconsistent with itself. It has in the habendum ninety-four and a quarter years, in the reddendum it has the said term of ninety-one and a quarter years. It is perfectly clear that, of the two terms ninety-four and a quarter and ninety-one and a quarter, one must be incorrect. In the ordinary case, the canon of construction would apply which says that the haben-

dum is to govern, because the lease is a grant by the lessor, and must be taken most strongly against him; and if the lease stood alone, "the said term of ninety-one and a quarter years" would be corrected and the ninety-one would be rejected, and the ninety-four in the habendum would govern the lease. But the first thing that a man of business would do on ascertaining the discrepancy in the lease, would be to look at the counterpart,—and the counterpart, it is to be observed, is the only document executed by the lessee,—and he would find that ninety-one and a quarter runs throughout. The counterpart was intended to be identical with the lease, and it is so with one exception, and that is from an inconsistency which is clearly a mistake in the lease. Looking at the two together, there cannot be a doubt that they were intended to be the one a copy of the other, and that each was intended to be consistent, and it was not intended that an inconsistency should be copied. Probably both lease and counterpart were copied from the same rough draft, and the mistake was made in the copying of the lease.

But we are told of another canon, that if the lease and counterpart differ, the lease is to prevail. I do not doubt that that would be so in the ordinary case. If in the lease the ninety-four had occurred in both places, and in the counterpart ninety-one in both places, I cannot doubt that we should have acted on the canon and have said that the lease must prevail. But the author, when stating the canon, had in his mind the ordinary case, assuming that there is nothing inconsistent in the lease itself. And I cannot doubt that we ought not to act upon the canon when it is clear that there is a mistake in the lease and the counterpart is consistent throughout. We do not overrule the canon, but we put a sensible and reasonable construction upon it.

Some of the cases, which have been cited for the plaintiff, but have not been noticed by the counsel for the defendant, have an important bearing, as shewing that the courts of law and equity,—for the rule was the same in both,—where there is a manifest error in a document, will put a sensible meaning on it by correcting or reading the error as corrected. *Spyve* v. *Topham* (1) was a

(1) 3 East, 115.

1876

BURCHELL v. CLARK.

rather stronger case than the present. A lease having been made to the trustee, the release by mistake was made to the cestui que trust, so that no estate passed by the exact words of the deed. But the title was held to be good. And Lord Ellenborough expressed himself as glad to find satisfactory cases which authorized the Court to put a construction on the deed in support of it, which from the reason and good sense of the thing they would probably have done without such authorities. Again, *Wilson* v. *Wilson* (1) is a very important case, and one in which Lord St. Leonards took part. There there was an agreement for separation of a husband and wife, and by a mistake in the draft deed the trustees were made to indemnify the husband against his own debts. The House of Lords, in accordance with good sense and reason, held that the name of the wife must be read instead of the name of the husband, and they ordered the execution of the deed in the terms in which they held the parties had intended the agreement to have been drawn up. This was a case, therefore, not of rectifying a written instrument, but of carrying out an agreement by reading the written instrument as if the manifest error had been corrected. On these short grounds, I think, finding an inconsistency in the lease, and looking at both documents, we are fully justified in holding that, according to the proper construction, ninety-one and a quarter must be read instead of ninety-four and a quarter. That being so, the defendant must stand in the same position as the original lessee, as it is clear that the original lessee could not convey more than he took under the lease. The judgment must be reversed and entered for the plaintiff.

*Judgment reversed.*

Solicitor for plaintiff: *W. W. Hayne.*

Solicitors for defendant: *Mackeson, Taylor, & Arnould.*

(1) 5 H. L. C. 40; 23 L. J. (Ch.) 697.

[IN THE COURT OF APPEAL.]

1876
*Dec.* 9, 11.

STONE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF YEOVIL.

*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 9, 22, 68—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12—*Purchase of Stream of Water—Compensation for injuriously affecting Land—Tenant for Life—Ultra vires.*

Under a local Waterworks Act, which incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, the defendants were empowered to take, use, divert, and appropriate certain streams, and amongst others a stream necessary for the working of a mill, of which the plaintiff was tenant for life. The defendants gave the plaintiff notice of their intention to take the whole of the stream, but actually diverted only a portion of it; and afterwards, by an agreement purporting to be made under the special Act, the plaintiff and defendants nominated two practical surveyors to determine the amount of compensation to be then paid by the defendants for the damage which the owner or owners for the time being of the mill might sustain by the abstraction of the whole of the stream which the defendants were authorized to take. The two surveyors did not agree on a valuation, and accordingly a third surveyor was nominated by two justices under the 9th section of the Lands Clauses Act, on the application of the defendants, and with the consent of the plaintiff, to determine the amount of compensation for the damage to the mill, and he awarded the sum of 939*l.* for compensation for the permanent damage to the owners of the mill from the abstraction of the whole of the stream.

To a statement of claim alleging the above facts, the defendants demurred, on the ground that they had no power to agree to make compensation for the abstraction of the whole stream, but only for such damage as was done to the owner of the mill from time to time:—

*Held*, affirming the decision of the Common Pleas Division, that the defendants had power under their Act to purchase and divert the whole stream, and that having given notice to the plaintiff of their intention to do so, they were bound and impowered to make compensation at once for the whole value of the interest of the owners of the mill in the stream, and not merely to compensate them from time to time for injuriously affecting the property.

*Held*, also, that if the case was considered as one of injuriously affecting the property, the statement disclosed a good agreement, by a limited owner for compensation for permanent injury to the property, under the 9th and 68th sections of the Lands Clauses Act, 1845.

The 9th section of the Lands Clauses Act, 1845, applies to compensation for injuriously affecting land not taken by the promoters as well as to compensation for taking lands; the words "injury to any *such* lands" meaning injury to lands held by persons under disability.

The 68th section of the same Act applies to persons under disability claiming compensation for permanent injury to land as well as to owners in fee.

*Ferrand* v. *Corporation of Bradford* (21 Beav. 412), followed.

*Bush* v. *Trowbridge Waterworks Co.* (Law Rep. 19 Eq. 291; 10 Ch. 459), distinguished.

APPEAL from a judgment of the Common Pleas Division. (1)

(1) 1 C. P. D. 691.

1876

STONE v. CORPORATION OF YEOVIL.

The statement of claim is fully set out in the previous report. It is sufficient to state shortly the substance of the allegations, which were as follows:—

The plaintiff, T. Stone, was tenant for life of a water grist mill and premises called Withyhook Mill, in the parish of Leigh, in the county of Dorset, and to the use and enjoyment of certain streams and springs of water flowing down to the said mill.

By the Yeovil Improvement Act, 1870 (33 & 34 Vict. c. lxxxviii), which incorporated the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Waterworks Clauses Acts, 1847 and 1863 (10 & 11 Vict. c. 17, and 26 and 27 Vict. c. 93), the defendants were authorized and empowered to construct certain waterworks for supplying water to the borough of Yeovil, and for that purpose might purchase, enter upon, take, use, get, divert, and appropriate the streams, springs, waters, and sources of water shewn on the deposited plans, and described in the deposited books of reference. (1)

In or about the month of September, 1872, the defendants gave notice to the plaintiff of their intention to divert and appropriate, for the purpose of the waterworks authorized by their Act, the whole of certain streams flowing down to, and forming the principal supply of, water to the plaintiff's mill; and at or about the same time they actually took and diverted a great portion of the streams.

A correspondence took place between the solicitors of the plaintiff and the solicitor of the defendants as to the best mode of determining the amount of compensation due to the plaintiff, and on the 13th of April, 1874, an agreement was made between the plaintiff and the defendants, by which, after reciting that the

(1) The 8th section of the Yeovil Waterworks Act, 1870, was as follows: "Subject to the provisions of the Act the corporation may make and maintain in the lines or situations and according to the level shewn on the deposited plans and sections, the tanks or reservoirs, conduits, lines of pipes, and other waterworks shewn on the deposited plans, with all proper embankments, approaches, works, and conveniences connected therewith, and may enter upon and use such of the lands described in the deposited plans and books of reference, and being within the limits of lateral deviation by this Act authorized, as they may require for that purpose, and may purchase, enter upon, take, use, get, divert, and appropriate the streams, springs, waters, and sources of water shewn on the deposited plans, and described in the deposited books of reference."

defendants, under the Yeovil Improvement Act, 1870, and the several Acts incorporated with it, were empowered and intended from time to time to take, use, divert, and appropriate streams and springs therein specified, and that the plaintiff, as tenant for life of the Withyhook Mill and certain lands adjoining, under the will of John Stone, was interested in all or some of the said streams and springs, it was witnessed as follows: "Now be it known, that in pursuance of the Lands Clauses Consolidation Act, 1845, the corporation do hereby nominate on their behalf Henry Parsons, of, &c., an able practical surveyor, and the said T. Stone doth hereby nominate John Day, of, &c., another able practical surveyor, to be the two surveyors who shall determine (if they can agree) the amount of compensation-money to be now paid by the corporation for the damage which the owner or owners of the said premises may sustain by the abstraction of the whole of the said streams, springs, and waters which the said corporation are so as aforesaid authorized to take, use, divert, and appropriate for the purposes of the said waterworks or otherwise, by reason of the creation of the powers of the first-mentioned Act."

This agreement was signed by the plaintiff, and sealed with the seal of the corporation.

The 8th paragraph in the statement of claim alleged that Henry Parsons and John Day, the valuers mentioned in the agreement, having disagreed in the valuation of the matters and things referred to them by the said agreement, James Rawlence, an able practical surveyor, was shortly afterwards, upon the application of the defendants and with the consent of the plaintiff, duly nominated by two justices in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, to determine the amount of compensation to be paid by the defendants to the plaintiff in respect of the damage and injury to the said mill and premises as aforesaid.

James Rawlence, by his award and valuation, certified that the sum of 939*l.* 5*s.* was the compensation-money to be paid by the defendants for the permanent damage and injury which the owner or owners for the time being of the mill, lands, and premises might have sustained, or should or might sustain, by the abstrac-

1876

STONE v. CORPORATION OF YEOVIL.

tion of the whole of the streams, springs, and waters which the corporation were authorized to take, use, divert, and appropriate.

The defendants themselves took up the award and valuation, but refused to pay the amount awarded either to the plaintiff or into the bank, under the provisions of the Lands Clauses Consolidation Act, on the pretext that the award was ultra vires and invalid.

The plaintiff accordingly claimed 939*l.* 5*s.* and interest, and a writ of mandamus directing the defendants to pay the amount into the bank.

The defendants demurred to the plaintiff's statement of claim on the ground, amongst others, that it did not affirm that the plaintiff, as such limited owner as in the statement of claim mentioned, could or did ever agree to sell or convey, or that the defendants could or did ever agree to purchase, take, use, divert, or appropriate the whole of the streams, springs, and waters mentioned in the statement of claim, or any of them.

The Court (Brett and Archibald, JJ.) overruled the demurrer, and the defendants appealed. (1)

(1) The following were the sections particularly referred to in the argument:—

8 & 9 Vict. c. 18, s. 9, enacts that "The purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands, except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provisions hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party; and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall, upon application of either party after notice to the other party, for that purpose nominate," &c.

Sect. 22 enacts that "If no agreement be come to between the promoters of the undertaking and the owners of, or parties by this Act enabled to sell and convey or release any lands taken or required for, or injuriously affected by, the execution of the undertaking, or any interest in such lands as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof; and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices." If exceeding 50*l.*, to be settled by arbitration, or by the verdict of a jury (s. 23).

Sect. 68 enacts that, "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been

*Kingdon, Q.C.*, and *H. C. Batten*, for the defendants. The defendants having only occasion for a portion of the stream, and having only diverted a portion, are not bound to pay for the whole. Unless they are so bound, they cannot bind the rate-

---

taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith; and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided." The section then goes on to provide for the mode of settling compensation by a jury.

The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6, enacts that, "Where, by the special Act, the undertakers shall be impowered for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the powers so given to them, be subject to the provisions and restrictions contained in this Act, and, if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, . . . and shall make to the owners and occupiers of, and all the parties interested in, any lands or streams taken or used for the purpose of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise, by the execution of the powers thereby conferred, full compensation, for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands or streams, of the powers vested in the undertakers, &c.," such compensation to be ascertained in the manner provided by the Lands Clauses Consolidation Act, 1845.

Sect. 12 enacts that, subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, the undertakers may, amongst other things, "from time to time divert and impound the water from the streams mentioned for that purpose in the special Act, or the plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works: Provided always that, in the exercise of the said powers, the undertakers shall do as little damage as can be, &c., and shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers."

1876

STONE v. CORPORATION OF YEOVIL.

payers: *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1) The agreement was entered into under a mistake by both parties as to the law. In *Ferrand* v. *Corporation of Bradford* (2), Lord Romilly, M.R., laid it down that the abstraction of the water should be treated as a purchase of the stream, and must be paid for at once. But that case was overruled by the present Master of the Rolls in *Bush* v. *Trowbridge Waterworks Co.* (3), and his decision was affirmed on appeal by the Lords Justices. (4) It was there held that the abstraction by a waterworks company of water from a stream does not entitle the riparian owner below to treat with the company as purchasers of part of the stream, but that he must obtain compensation from time to time for the injury done to his property. The defendants have taken nothing from the plaintiff; the water does not rise on his land. The injury to his land is only consequential. In this respect the case differs from *Croft* v. *London and North Western Ry. Co.* (5) The 12th section of the Waterworks Clauses Act empowers the corporation to take what water they want from time to time, so that the injury to the riparian owners varies from time to time.

[BRAMWELL, J.A. Do you mean that every day they must apply afresh for compensation as the damage arises?]

It would be unreasonable to apply every day, but whenever any alteration occurs in the amount of injury there must be a fresh assessment. If, therefore, this agreement had been made by a tenant in fee, it would have been even then beyond the power of the defendants to concur in it; but the present case is still stronger, for the plaintiff was only tenant for life, and unless he can shew that he has made the agreement within the Lands Clauses Act, he cannot bind the remaindermen. The parties appear to have intended to proceed under the 9th section of the Lands Clauses Act; but that section only applies to lands "purchased or taken," and where the clause speaks of "permanent damage or injury to such lands" it refers to cases in which the minerals or some other interest in the soil may be vested in third persons, and not included in the purchase. The word "such" cannot be rejected, as

(1) Law Rep. 7 H. L. 653.
(2) 21 Beav. 412.
(3) Law Rep. 19 Eq. 291.
(4) Law Rep. 10 Ch. 459.
(5) 3 B. & S. 436.

has been done by the judges in the Court below. Moreover, the 9th section implies that there has been an agreement between the parties as to the price, and the valuation is only to be made as a check upon such agreement for the security of the remaindermen; but there was no agreement in this case on which to found the proceedings. It is suggested that the proceedings may be good under the 68th section of the Lands Clauses Act, but that section does not apply to owners under disability.

*Butt, Q.C.*, and *Petheram*, for the plaintiff. The 8th paragraph in the statement sufficiently shews an agreement for compensation at the price to be determined by a surveyor under the 9th section of the Lands Clauses Act. That section relates to permanent injury to land as well as to the purchase of land. It is not necessary to reject the word "such" as unnecessary. It may mean "lands so owned" —that is, by persons under disability. But, in truth, this agreement treats the transaction as a purchase of the whole interest in the water, for which the tenant for life had a right to contract under the powers of the Lands Clauses Act. The fact of the spring not rising in the plaintiff's land makes no difference; any riparian owner has an interest in the water running through his land which may be the subject of sale.

They were stopped by the Court.

COCKBURN, C.J. The appellants, the municipal corporation of Yeovil, the defendants in this action, were, by a local Act passed in 1870, empowered to construct waterworks for supplying the borough of Yeovil and a certain adjacent district with water. For this purpose they were empowered to "purchase, enter upon, take, use, get, divert, and appropriate the streams, springs, waters, and sources of water shewn on the deposited plans, and described in the deposited books of reference." The Waterworks Clauses Act, 1847, and the Lands Clauses Consolidation Act, 1845, are incorporated with the local Act. Among the streams so authorized to be taken was one which, rising some distance above a mill and premises of which the respondent, the plaintiff in the suit, is seised as tenant for life, and flowing onwards to his mill and premises, was essential to the working of the mill. The appellants, under the powers of their Act, gave notice to the respondent of their

1876

STONE v. CORPORATION OF YEOVIL.

intention to divert and appropriate the whole of the stream, and they proceeded to take and divert a great portion, but not the whole, of the water. The necessary effect of this diversion of the water being to cause serious and permanent injury to the respondent's mill, a correspondence took place between the solicitors of the respective parties, and an agreement was drawn up in which, after reciting the Act, and that the corporation, for the purposes of the waterworks, "intended from time to time to take, use, divert, and appropriate the waters in question, and that T. Stone, as tenant for life of a certain mill called Withyhook Mill, was interested in such streams or waters," each party proceeded, according to the terms of the 9th section of the Lands Clauses Consolidation Act, to appoint an able practical surveyor "to determine the amount of compensation to be paid by the corporation for the damage which the owner or owners for the time being of the said premises might sustain, by the abstraction of the whole of the said streams, springs, and waters."

The surveyors so appointed not being able to agree, application was made on behalf of both parties, according to the provisions of the section, to two justices to appoint a surveyor to determine the amount of compensation, which was accordingly done, and the amount was assessed at 939*l.* 5*s.*

The plaintiff having instituted a suit in the Court of Common Pleas, for a mandamus to the corporation to deposit the amount according to the provision of the 69th section of the Lands Clauses Act, the defendants demurred to the claim, their contention being that in entering into the agreement they had acted ultrà vires, inasmuch as, intending to take a portion of the water only, they were not bound to make compensation beyond the extent to which the abstraction of the water in the individual instance might injuriously affect the mill and premises; in support of which they mainly relied on the authority of a recent decision of the present Master of the Rolls in a case of *Bush* v. *Trowbridge Waterworks Co.* (1), upheld by the Lords Justices on appeal (2), in which case a portion of the water of a stream having been diverted prior to its reaching the plaintiff's land, it was held that compensation could not be claimed for the loss of the stream, but only so far as

(1) Law Rep. 19 Eq. 291. (2) Law Rep. 10 Ch. 459.

the diversion of the quantity taken injuriously affected the plaintiff's land.

The present case is, however, plainly distinguishable from that of *Bush* v. *Trowbridge Waterworks Co.* (1) In the latter case the water company took power to divert only a portion of a brook which flowed through the plaintiff's land, and though the portion abstracted prevented the stream from being of the same practical benefit in the way of irrigation to the plaintiff which it had been before, the brook or stream, though seriously diminished in quantity, continued to run through the land as before, and it is upon this that the judgments of the Master of the Rolls and the Lords Justices appear to have proceeded. In the present case the corporation have taken power to divert the whole body of the stream, and given notice to the plaintiff of their intention to do so, and the case comes within the principle of the decision of Lord Romilly in *Ferrand* v. *Corporation of Bradford* (2), which is by no means overruled by or inconsistent with the decision in the case of the *Trowbridge Waterworks Co.* (1) Under these circumstances the plaintiff becomes entitled under the 8th section of the local Act and the 6th section of the Waterworks Clauses Consolidation Act, 1847, to compensation for the value of the entire stream, and not merely to compensation proportioned to the degree in which his land may be injuriously affected by each partial abstraction of the water.

By s. 8 of the local Act the corporation are empowered to enter upon, take, and appropriate the streams and waters to which the Act relates as a whole, not to take so much of them as they may find convenient, or so much as they may think expedient to take from time to time. The owner or occupier of a stream so taken would have a perfect right to say, "You must take the whole or none." He would equally have a right to say, "You shall not take the water from time to time, leaving me in entire uncertainty when you will take all or more, or how much you may find it convenient to take next." And here the corporation gave notice, as I think by the Act of Parliament they were bound to do, of their intention to take the whole; and while they have become entitled to take they have become equally bound to take

(1) Law Rep. 19 Eq. 291. (2) 21 Beav. 412.

1876

STONE v. CORPORATION OF YEOVIL.

the whole. The position of the respective parties would otherwise obviously be most unequal. Under these circumstances, I am of opinion that the corporation, if they took any of the water, were bound to take, or at all events, to pay for, the whole, before they could acquire the right to take any. If, having acquired the right to take the whole, they found it more convenient to take it by instalments, leaving the residue to flow on in its usual course, and giving the landowner the benefit of it in the meantime, they might possibly have the right to do so, but they could not compel the landowner to accept partial compensation on each renewed taking.

Now when the whole of a stream or other water is taken, both the special Act and the general Act treat the right or interest in the water as a substantive right or interest which may be transferred and taken, and the value of which may be assigned and compensated for, and not as something merely subordinate to the land, and the loss of which must be looked at only as it injuriously affected the land. The 6th section of the Waterworks Clauses Act expressly says that compensation is to be made "for the value of streams so taken," as distinguished from "damage to land or streams" occasioned by the exercise of the statutory powers given to take the water.

No doubt, in estimating the value of a stream it is necessary to take into account the use to which it can be put relatively to the land. In itself, except so far as the right of fishing may be concerned, the value of the water of a private stream is insignificant. It is only in so far as the water can be made available for the purposes of irrigation, or for watering cattle, or turning a mill, or the like, or as adding to the value of property as ornamental water, that water can be said to have value, and the compensation to be paid for its loss must, therefore, practically speaking, be measured by the deterioration of the value of the land occasioned by such loss. Nevertheless, when a statute says that when water is about to be taken its value shall be assessed and paid, it seems to follow that, before any of it can be taken, that value must be paid, and that the water cannot be taken in parts, and compensation be made, in proportion as the value of the land becomes from time to time affected by its loss.

There is some difficulty in applying the Lands Clauses Act, to which it becomes necessary to resort for the purpose of determining the amount of compensation to be paid, to such a case as the present. The plaintiff, being tenant for life only, could not, except by virtue of the 7th section of the last-named Act, claim for more than his life interest, or for those in remainder. By that section a tenant for life is enabled to do so whether in respect of an estate in the land or, as in this case, in respect of an interest in the water. But by the 9th section the compensation (except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices, for all which modes of proceeding provision is afterwards made by later sections of the Act), shall not be less than shall be determined by the valuation of two able practical surveyors, one to be nominated by each party, and if these cannot agree, by a third surveyor to be nominated by two justices. Though dealing in this part of the Act only with the power of persons under disability to convey the whole estate, the framers of the 9th section have further applied, as it were by anticipation, its provisions to permanent damage or injury to lands held by these parties; such being obviously the meaning of the words "such lands," which words, I think, cannot, as has been suggested, be struck out as surplusage, being, on the contrary, words essential to the true meaning of the enactment. But with this we are not concerned, inasmuch as we are here dealing with the substantive right to the water, and not to any consequential damage either to the water or to the land by means of the abstraction of any part of the stream, and the difficulty consists in applying the provisions of the 7th and 9th sections of the Act to a case, not of voluntary purchase and conveyance to which this part of the Act and these sections relate, but to a case in which the water is taken compulsorily. Looking, however, to the fact that, upon the amount of purchase-money or compensation ascertained to be payable to persons under disability, but enabled by the statute to convey, being paid in to the account of the Accountant General under s. 69, such person must, under the operation of s. 75, convey the land or water, as the case may be, to the promoters of the undertaking, and that in s. 9 the mode of proceeding adopted by the parties in this case is men-

1876

STONE v. CORPORATION OF YEOVIL.

tioned as one that may be adopted for ascertaining the value, though it is there referred to more immediately with reference to the matter of voluntary sale, it seems to me that upon entering into this agreement the plaintiff may be considered as having been ready and willing to convey, and the defendants as having been ready and willing to accept the conveyance of, the plaintiff's right in the water on the amount of compensation being assessed by this mode of proceeding. The tenant for life was, under s. 7, enabled to convey his interest in the water, provided s. 9, which was intended to protect the interests of those in remainder, was complied with. It was competent to the defendants to agree to the necessary steps being taken to satisfy the exigency of s. 9. It was in the interest of both parties that this should be done in order to obviate the necessity of any other form of proceeding. If this course had not been adopted, recourse must have been had to a jury, or to arbitration in a different form, as provided by the Act. It was, as it seems to me, equally competent to the parties to proceed as they have done under the 9th section.

I cannot therefore say that in entering into the agreement to which the plaintiff seeks to hold the defendants bound, the latter were in any way acting ultra vires, and are therefore entitled to have the agreement treated as invalid. I am therefore of opinion that this appeal must be dismissed, and the judgment of the Common Pleas Division must be affirmed.

BRAMWELL, J.A. I am of the same opinion. Notwithstanding that the Lord Chief Justice has stated the facts, I think it will be convenient if I shortly mention how I understand them. The plaintiff, as the tenant for life of this mill, was entitled to the flow of water. The defendants have given notice to take the whole of the water, and they have erected certain contrivances, and have taken a portion of the water, so that a wrong would have been done to the plaintiff if it were not that the defendants were authorized to do what they have done under the Act of Parliament. But that entails upon the defendants that they must in some way compensate the plaintiff, either by purchasing from him a right to do what they have done or by compensating him for the damage they have done; and, accordingly, the plaintiff and the defendants

have agreed that the defendants—for I have no doubt this is the meaning of the agreement—should have for ever the right to do that which they are doing at this moment, and should pay the price or compensation for so doing. But the plaintiff, being only tenant for life, could not agree to a price less than should be fixed by two able practical surveyors, or, in their default, by a third able practical surveyor appointed by two justices. The plaintiff could agree to take such sum as should be fixed by such able practical surveyor or surveyors, and he has agreed to take it on behalf of himself and his remaindermen, and the defendants have agreed to pay; and, accordingly, each appointed an able practical surveyor, and in default of the agreement of these two, the justices appointed a third surveyor, and he has made a valuation which, according to the agreement, ought to be paid by the defendants, but they object to do so. Therefore the plaintiff has brought an action for a mandamus to compel them, not indeed to pay him, but to pay the money into the bank as directed by the Act. These being the facts, as I appreciate them, the question is whether the agreement is ultra vires, that is to say, whether the defendants could, in point of law, validly make such an agreement as this; and the question is just the same as if the plaintiff had been a tenant in fee and the money had only to be paid to him. Could the defendants agree with a tenant in fee for the purchase from him once for all of the right to do that which they have done, and which they propose continuing to do? Now, I am of opinion that they could lawfully and intra vires enter into such an agreement as that. The first question I put to myself is that which I put to Mr. Kingdon. If this cannot be done, what is the remedy of the plaintiff and those who shall come after him under this statute? and Mr. Kingdon was obliged to say—he can say nothing else—"He must from time to time as he is damaged within the 68th section of the Lands Clauses Act, which is incorporated with the private Act of this company, take proceedings under that section." Then I asked Mr. Kingdon whether this must be done daily? He said, "No; no reasonable man would take proceedings daily." Perhaps, but I see nothing unreasonable in proceedings being taken monthly. If there is damage to the extent of 50*l.* in the course of a month why should not the plaintiff have compensation at once,

1876

STONE v. CORPORATION OF YEOVIL.

and if the parties cannot agree, why should he not take proceedings under the 68th section? But suppose we say yearly, or every five years, is it conceivable that the legislature can have left landowners in such a condition that all that can be done to adjust their rights or compensation for their wrongs is that there must be these continually recurring proceedings under the 68th section? I am convinced that it cannot be so, unless by some extraordinary oversight on the part of the legislature, and I think it not unreasonable to approach the construction of the other sections of the Act of Parliament with the belief that this cannot be the meaning, and that there must be some other.

Looking at the private Act, it seems to me that, under s. 8, the defendants have power to purchase out and out—to use a short expression—the right which they propose to exercise for all time, because s. 8 says they may make and maintain their lines of pipes, and so forth, and enter upon, take, and use the lands described, and may purchase, enter upon, take, use, get, divert, and appropriate the streams, springs, waters, and sources of water. Now when it says they may purchase the stream and sources of water, what does that mean? It does not mean merely that they may purchase of the owner the lands in which a stream or source of water rises, because that would not be purchasing the water, for it is not the water of such a person to sell. He may sell the lands, or he may sell all his rights in the springs which rise on the land, but those rights are not to withhold the water from those persons to whom it would come in the natural course of things. Therefore that cannot be the meaning of the Act. The only sensible meaning that we can put on these words is, that the water may be purchased in this sense, that no riparian owner to whom it may come shall have a right to complain. In other words, they may purchase from all the riparian proprietors the right to divert the water without complaint. I think that is the obvious meaning of the Act of Parliament. This opinion of mine is not inconsistent, in my judgment, with *Bush* v. *Trowbridge Waterworks Co.* (1), nor with anything said in that case. There the question was an entirely different one to that now before us. I need not say that if I thought what I was saying was in the least inconsistent with

(1) Law Rep. 19 Eq. 291; Law Rep. 10 Ch. 459.

the decision in that case, I should not say it at all, because I should consider myself bound by that decision, or if I really felt compelled to say it, I should do so with the greatest hesitation and reserve, considering who gave that judgment. But in my opinion it is not inconsistent. As I understand that case, it was an attempt to make the corporation, who wanted a part of the stream only, take the whole of it, which was very properly denied. On these grounds, therefore, I think, under s. 8 of the local Act, there was power to enter into this bargain. Supposing I am wrong in that it seems to me a matter of indifference, because on that supposition I am of opinion that the case would be within the 9th section of the Lands Clauses Act. I do not think the word "such" ought to be rejected there; but it cannot, to my mind, be read literally as it stands there, namely, as meaning "lands taken by them," for, if so, there would be this absurdity, as Brett, J., pointed out (1), that they are to arrange for compensation for permanent damage or injury to lands which did not continue to belong to the landowner, but which had been taken by themselves. "Such lands" means "lands so owned," and that the section provides for permanent damage or injury to any so-owned lands. That may be an inaccuracy, but I hold that is the meaning of the clause. Therefore I say that, supposing the case is not within the 68th section of the Lands Clauses Act, it is within the 9th section.

Now is there a power of compensating once for all? I hold that under the 68th and 9th sections together there is such a power. Consequently, whether this is to be treated as a purchase or a compensation for lands injuriously affected, it was clearly competent for the parties to enter into the agreement they have entered into. Why not? We have been shewn the enormous inconvenience if it were not so. Take the case of lands injuriously affected. Suppose lights are obstructed. You would not say there that the tenant was to make his claim for compensation under the 68th section from time to time as the damage was incurred. It may be said that what obstructs the light is of a permanent character. That is not necessarily so; the company may alter their works, or the obstruction may be made more permanent. Therefore you cannot say the damage is the same for

(1) 1 C. P. D. at p. 701.

1876

STONE v. CORPORATION OF YEOVIL.

all time. Again, take the case of a way. It is an inconvenience to a person if a way be diverted so that his premises are made more difficult of access, and he is entitled to compensation for that injury. It may be that the number of people coming that way increases, and, therefore, the inconvenience is greater at one time than at another. But no doubt he may have compensation once for all. It may appear at first sight impossible, although Mr. Kingdon did not say so, and probably he does not think it, to put a value on a thing so uncertain as this, inasmuch as the damage at one time may consist in taking half, at another time a quarter, and at another time the whole. Now I am satisfied it is not impossible. Any able practical surveyor might put a fair price which ought to be paid for any part necessary to be taken. I may refer to a case within my own knowledge as counsel in the case. I mean the case of the New River Company. The Lea Company sold the New River Company the right of taking, not a certain quantity of water, but as much as they could take if they pleased by a gauge constructed in a particular way. It did not follow that they always took the whole. If the springs of the New River were abundant they took none, if they were low they took a great deal; and other convenient arrangements might be devised. Otherwise what is the miller to do? When he knows once and for all that he will have no further compensation for what has happened, he adjusts his mill to the probable supply which he expects to get. For instance, if the mill originally required a power of water called A., and if he calculated that only half of the water had been taken, he might reduce his mill accordingly. What is he to do when it is precarious? If he keeps the original mill he requires the whole of A., and if he gets only half of A., it will not work. That is hard upon him and those who have to compensate him. But if he reduces the mill to the half of A., and it works properly and well, the persons so liable might say to him, "You are not damaged at all, all the mill you have got is properly worked." That is an absurd consequence, but it is a difficulty which may arise from this mode of compensation, that it may be either inordinate or inadequate. Another observation is this. If the plaintiff is to recover in consequence of his lands being injuriously affected by the execution of the works, he would be met by the difficulty I pointed out during the argument,

although I do not attach much importance to it. "It is not by our works we have done it. It is because we choose to use certain sluices in a particular way." I think the legislature meant to say that. when the works are executed in such a way as that they can be so used as to damage, that is a case in which the compensation should be paid once for all, and not from time to time. As to those words "from time to time," it is to be observed that they are not in s. 8 of the local Act, within which section this case properly comes. Nor are they found in s. 68 of the Lands Clauses Act, but whenever those words do occur, I think they mean this, that there may be cases in which from time to time there will be an alteration in the amount of permanent damage done, or within the power of the company to do; just as a railway company, or any other company that takes lands, might obstruct lights by a permanent building, and then might afterwards, by enlarging their building, further obstruct those lights. In the result, therefore, I am of opinion that there was a power to purchase this right under the 8th section of the local Act; that, if there was not, there was a power to agree upon a compensation to be paid under the 9th and 68th sections of the Lands Clauses Act, and that the case before us is equally good, whether the one or the other is right; consequently, that the judgment of the Court below is right, and should be affirmed.

AMPHLETT, J.A. I am of the same opinion. The case has been so fully gone into that I shall make but few observations. In fact I should make none, had it not been for the impression that seems to have been in the minds of the Court below, and in which I am unable to agree, that the case of *Ferrand* v. *Corporation of Bradford* (1), before Lord Romilly, was in fact overruled by *Bush* v. *Trowbridge Waterworks Co.* (2) I entirely agree with what the Lord Chief Justice has said, that those two cases stand perfectly well together; and I am confirmed in that view by the fact that the case of *Ferrand* v. *Corporation of Bradford* (1) was cited both before the present Master of the Rolls and before the Lords Justices, and neither one or the other alluded to the case in their judgments, or stated that they overruled it, which they would have done, I think, as a matter of courtesy, with reference to so recent a

(1) 21 Beav. 412. (2) Law Rep. 19 Eq. 291; 10 Ch. 459.

1876

STONE v. CORPORATION OF YEOVIL.

case had they intended to overrule it. But if we look at their judgments we find that they distinguish the case before them altogether from the former case. What was the former case? The corporation of Bradford, as it appears by the report, under the power to take the whole, or what they wanted, from time to time, had, before the bill was filed, taken the whole of the water flowing through the plaintiff's land. The question was, whether that was a purchase, so that the corporation could be called upon to deposit the presumed value before they could be allowed to go on with the diversion of the water. They, having by the terms of their Act power to purchase the stream, had, by taking the whole of the water, destroyed the stream which came through the plaintiff's property; and the Master of the Rolls held in that case, that it was a purchase of the stream, and therefore the provisions of the Act obliged them to pay the presumed value into Court before they could take it. The subsequent case of *Bush* v. *Trowbridge Waterworks Co.* (1) was this: there was a similar power to take the whole or a part. All they had done there was to divert a portion of the stream. What the plaintiff desired was to say, "Now you have taken a part you must purchase the whole," and he sought an injunction upon that footing. Both the Master of the Rolls and the Lords Justices held that that was not a purchasing of the stream; the defendants had power under their Act to take a portion of the stream, and the plaintiff must go under the 68th section and obtain compensation for the injury done to the stream and to his land by their taking a portion of the water. It appears to me, therefore, that those two cases both stand. Now the present case is exactly the same as the former case—*Ferrand* v. *Corporation of Bradford.* (2) Here is power to purchase the stream, and looking at the Waterworks Clauses Act, combined with the local Act, they have power if they like to take from time to time either the whole or a portion. Under these circumstances, I agree with what my learned Brothers have said, that in this case, like the case of *Ferrand* v. *Corporation of Bradford* (2), it is a purchase of the whole stream; and therefore the purchasing clause appears to me to be the clause that governs the case. But if I am wrong in that, supposing that it does not come within the pur-

(1) Law Rep. 19 Eq. 291; 10 Ch. 459. (2) 21 Beav. 412.

chasing clauses, and that it comes within the 68th section, which enables compensation to be given for damage done to lands, I think the result in this particular case is exactly the same. The result would not have been the same if the application here had been to oblige them to pay the full value of the stream into Court, as in the case of *Bush* v. *Trowbridge Waterworks Co.* (1) That could not be done. This is not like that case, this is merely an application for compensation for the damage done to them by the diversion of the stream; and, therefore, supposing it comes under the 68th section, it appears to me that compensation can be obtained in that manner precisely the same as if it were a purchase. There is some little ambiguity in the sections, but when you examine them particularly you will find that there can be no doubt that a limited owner can obtain full compensation, both for himself and for the remainderman, for the damage either done or apprehended to the lands. It is admitted that if it were a purchase that is so, because, under the purchase clauses of the Act, a limited owner can deal with a company exactly in the same manner as if he were the owner in fee, subject only to the reservation that if the price is not settled by arbitration, or by the verdict of a jury, then the agreed price must not be less than what may be found by an able practical surveyor.

Then you come to the 68th section, which relates to compensation for damage. The 68th section does not, in so many words, say that a tenant for life shall be on the same footing as a tenant in fee, and that he can get compensation, not for himself only, but for those who shall succeed him; but that is to be inferred from the next section, which relates to what is to be done with the purchase-money. That section relates not only to purchase-money of land from a sale, but provides also for the compensation to be paid for any permanent damage done to any such land. The inference, therefore, is that any tenant for life is as much able to bargain for any such permanent damages as for purchase-money. This is further confirmed by s. 9, which, I agree with my Lord Chief Justice and my Brother Bramwell, clearly includes cases of compensation for damage as well as of purchase-money. For I cannot at all agree with the suggestion of Mr. Kingdon, that the words

(1) Law Rep. 19 Eq. 291; Law Rep. 10 Ch. 459.

1876

STONE v. CORPORATION OF YEOVIL.

in s. 9, "compensation to be paid for any permanent damage or injury to any such lands" may mean compensation for injury done to mines or anything of that sort. It appears clear to me that they relate to any lands belonging to parties under disability. Therefore I think that the suggestion of the Court below, that the word "such" might practically be eliminated from the section altogether, cannot be admitted; for, as my Brother Bramwell said in the course of the argument, if you eliminate the word "such" altogether, you arrive at the absurd notion that a person having an absolute interest as tenant in fee would have to submit to the practical surveyor before framing a contract with the company. But if you take "such lands" as referring to a person under disability, the whole clause is rendered perfectly clear and intelligible. I think, therefore, that the tenant for life had power to bind the remainderman, and the only other question is, whether he has done so under this statement of claim. What the parties did was this—they entered into an agreement by which, evidently intending to proceed under the 9th section, they settled the price in this way: that the price should be ascertained by two able practical surveyors whom they named, and if they agreed, that should be the price. They did not go any further. Well, the surveyors did not agree. Therefore the tenant for life might possibly have said to the corporation: "They have not agreed. I object to go to the justices to have an able practical surveyor appointed to determine the amount of the compensation. That is only the minimum: I am not obliged to sell for a minimum. Therefore there is no agreement between us at all, and you must now go and have the value ascertained, first, by a jury or abitration, and there will be time after that to go before the justices for an able practical surveyor to be appointed." That would be a roundabout way, and would do no good to anybody; but possibly the tenant for life might have said that. But what follows? In the 8th paragraph of the claim it says that the defendants themselves made application to the justices to appoint an able practical surveyor, and the plaintiff consented to it. Taking that allegation, what is it? The tenant for life, having power to agree upon a price, says: "We will not trouble ourselves to fix the price now. I agree with you that you shall have the stream for such a price

1876

STONE v. CORPORATION OF YEOVIL.

as, under the 9th section, an able practical surveyor shall appoint." Having settled the price by that reference, it seems to me that the 9th section is complied with and the whole matter is settled. For these reasons I think the demurrer is bad.

*Judgment affirmed.*

Solicitors for plaintiff: *Warry, Robins, & Burges, for T. Ffooks, Shelborne.*

Solicitors for defendants: *Wedlake & Letts, for W. H. Batten, Yeovil.*

---

PARSONS *v.* TINLING.

1877

Jan. 30.

*Practice—Costs—Libel—"Follow the Event"—Judicature Act*, 1875, *Order LV.*

The effect of the Judicature Act, 1875, Order LV., is to repeal the previous statutes as to costs, with the exception of such of the provisions of the County Courts Act, 1867, as are expressly preserved by s. 67 of the Judicature Act, 1873.

The plaintiff in an action of libel recovered one farthing damages. The judge at the trial refused to give any certificate with regard to costs:—

*Held*, that by Order LV. the plaintiff was entitled to costs.

THE action was for libel, and the plaintiff upon the trial recovered one farthing damages. The judge at the trial, being asked by plaintiff's counsel to certify for costs, refused to certify or to interfere one way or the other. The master refused to tax the costs, on the ground that the plaintiff, having recovered less than forty shillings, was not entitled to costs.

Application was made to a judge at chambers for an order to the master to tax and was refused.

Against this decision the plaintiff appealed.

*Russell, Q.C.*, and *French*, moved that the master should be directed to tax the plaintiff's costs. The event here is in favour of the plaintiff within the meaning of the proviso to Order LV. (1) The contention of the other side must be that this Order means

(1) Order LV.: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; provided that, where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried, or the Court, shall otherwise order."

1877

PARSONS v. TINLING.

"shall follow the event," subject to the provisions of the existing statutes. It operates as a repeal of all the previous statutes as to costs. Those statutes were very numerous, and very great difficulty arose as to their application. It was clearly intended that a uniform system should prevail as to costs in all the Divisions. At common law under the old system the plaintiff who succeeded was generally entitled to his costs by statute. To this rule various statutes made exceptions. In equity the general rule was, that the Court had a discretion with regard to the costs. The new rule is obviously intended to provide for all cases, and to sweep away all the previous complication. If the contention that the old Acts still apply be correct, then the effect is, that they must apply in a case in the Chancery Division when tried by a jury. This is directly contrary to the general scope of the Act, which was rather to assimilate common-law procedure to equity than vice versâ. But if they do not so apply, then a diversity of practice is introduced. A strong argument in favour of the plaintiff is derived from s. 67 of the Judicature Act, 1873, which preserves expressly the provisions of the County Courts Act, 1867, as to costs. The natural implication from the express provision as to these enactments is, that the other Acts were not intended to be preserved. [They cited *Sampson* v. *Mackay* (1) and *Baker* v. *Oakes.* (2)]

*Pope, Q.C.*, and *McConnell*, shewed cause. There is no express repeal of the previous enactments with regard to costs in the Judicature Act or Rules. The rule of construction is, that where there is no express repeal the later enactment is to receive a construction consistent with the former enactments if possible. And general words are not to be construed as repealing special provisions relating to particular cases: *Dodds* v. *Shepherd* (3); *Conservators of the Thames* v. *Hall.* (4) A reasonable construction may be given to the proviso to Order LV. without interfering with the special provisions of the previous statutes as to costs in particular cases. By "following the event" the Order means that the result as to costs is to follow on the finding of the jury in the same manner as it would have done before the Act. [They cited *Kelcey* v. *Stubbles* (5) and *Moore* v. *Watson.* (6)]

(1) Law Rep. 4 Q. B. 643.
(2) W. N. Jan. 20, 1877, p. 2.
(3) 1 Ex. D. 75.
(4) Law Rep. 1 C. P. 421.
(5) 1 H. & C. 576; 32 L. J. (Ex.) 6.
(6) Law Rep. 2 C. P. 314.

*Russell, Q.C.*, in reply.

1877

PARSONS v. TINLING.

LORD COLERIDGE, C.J. We are called upon to construe the words of Order LV. There is no doubt that, according to the law that existed previous to the Judicature Act, the plaintiff would not get his costs in this case, inasmuch as the plaintiff only got a farthing damages, and the judge declined to certify or to interfere one way or the other. No question arises in this case of any application to the discretion of the Court with regard to costs. The whole matter turns therefore upon the meaning of the words in the proviso to the Order "the costs shall follow the event." It must be observed that the Order is made "subject to the provisions of the Act," and we do not intend to express any doubt that those words govern the proviso as well as the previous part of the Order, but they do not appear to affect the present case, inasmuch as s. 67 of the Judicature Act, 1873, which appears to be the only section applicable to this matter, preserves the provisions of the County Courts Act, 1867, as to costs, only in cases where relief is sought which can be given in the county court; the present action being an action of libel, which could not be brought in the county court, that section does not apply.

It is contended that, because, before the Act, the costs would not have followed the event, inasmuch as the damages obtained by the plaintiff did not amount to a certain sum, therefore the plaintiff does not come within the words of the proviso. In other words, that the true construction of the proviso is, that the words "shall follow the event" mean, shall follow the event according as before the Act they would or would not have done so. This would require a very considerable interpolation of words into the Order, and such as we ought not to make unless some overwhelming necessity for it could be shewn to exist either with reference to the intention of the Act or the authority of previous judicial decisions.

But I find no good reasons from the construction of the Act, nor any authority, to justify our assenting to the defendant's contention. The Order is made under the Judicature Act, the express object of which was to bring under one system those diverging codes of law and practice previously known as common law and

1877

PARSONS v. TINLING.

equity. I assent to the view of the plaintiff's counsel that, speaking broadly and leaving out of sight certain cases in which comparatively recent statutes had interfered, at common law the costs followed the event, and were not in the discretion of the judge, as in equity they were. The manifest object of the Act was to assimilate the practice of law and equity, and to make one rule for all Divisions of the one Court. Reading the order by the light of this intention, its meaning seems plain enough. The general rule is to be that costs are to be in the discretion of the Court, but there is a reservation of the right to costs to which certain innocent parties, such as trustees, had been previously entitled in equity, and a provision that when the action is tried by a jury the costs are to follow the event, unless at the trial, for good cause shewn, the judge or the Court shall otherwise order.

Here, according to the ordinary meaning of the words, the event was entirely in favour of the plaintiff, and the enactment is that the costs shall follow that event. The reason of the thing is all in favour of giving the words of the Order their plain natural meaning. Whereas before the Act the question of costs was often a very difficult one, depending on a multiplicity of statutes, and the rule differed in different courts; now, this one short Order is to govern them in all cases in a manner intelligible to everybody.

There seems, therefore, to be no reason derived from the construction of the Act in favour of the defendant's contention. Then is there any authority such as to compel us to take his view? The cases of *Kelcey* v. *Stubbles* (1), and *Moore* v. *Watson* (2), were cited by the defendant's counsel, but they do not support his contention. The former case was one in which the Court had to decide upon the words "the costs of the reference shall abide the event" in an order of reference. The action was of a complicated nature, upon a farming lease, and the lessor claimed in respect of breaches of a number of covenants. The arbitrator found substantially for the defendant, but upon one issue he awarded the sum of sixteen shillings to the plaintiff. The Court of Exchequer were asked to say that the plaintiff was entitled to the costs of the reference. The case might have been some authority for the

(1) 1 H. & C. 576; 32 L. J. (Ex.) 6. (2) Law Rep. 2 C. P. 314.

9 Jur. N.S. 256

defendant if the Court of Exchequer had decided that, as a matter of fact, the event of the reference was in favour of the plaintiff, but they decided the reverse; they said that the plaintiff had substantially failed and the defendant succeeded: that the substance of the matter must be looked at, not the form, and that they were free to look into the question, who had in substance succeeded on the issues raised before the arbitrator? They, therefore, refused to make an order for the taxation of the plaintiff's costs. There can be no doubt, as it seems to us, that the event in this case, where there has been a trial by a jury who have found for the plaintiff, is in favour of the plaintiff. The case of *Moore* v. *Watson* (1) was this: There was in that case a compulsory reference, and the order provided that the costs of the action should abide the event, and the costs of the reference should be in the discretion of the master. The master found for the plaintiff for less than 20*l.*, and under the discretionary power given by the order, gave the plaintiff the costs of the reference. The Court set his allocatur aside on the ground that, the reference being compulsory, the award of the master was in the same position as a verdict of a jury, and the County Courts Act consequently disentitled the plaintiff to any costs. The principle of that decision has no bearing on the present case. The case of *Dodds* v. *Shepherd* (2) was also cited, but that decision was not upon the order now before us, and turned on wholly different words. It really has no bearing on the present case. There does not appear to be any authority which should lead us to depart from the plain meaning of the words of the Order. I am, therefore, of opinion that this application should be granted.

GROVE, J. I am of the same opinion. I quite agree with the doctrine laid down in *Dodds* v. *Shepherd* (2), and *Conservators of the Thames* v. *Hall* (3), viz., that when there is no repeal by affirmative words, in a subsequent Act, of the provisions of previous Acts, the subsequent Act does not operate to repeal those provisions unless it is inconsistent with them. But it appears to me that the provisions of Order LV. are plainly inconsistent with the previous Acts as to costs. It seems to me that it was intended

(1) Law Rep. 2 C. P. 314. (2) 1 Ex. D. 75.
(3) Law Rep. 1 C. P. 421.

1877

PARSONS v. TINLING.

to make a new rule altogether. The rule is expressed to be "subject to the provisions of the Act." Those words do not affect the present case, because the only section applicable to the matter before us is s. 67 of the Judicature Act, 1873, and the present action was not one which could be brought in the county court; but the words are not without an important bearing on the construction of the Order. If the legislature had meant, by "event," the event according to the previous statutes as to costs, as has been contended, surely they would have said, "subject to the Act and the existing statutes as to costs," or used some such words to convey their meaning, whereas the rule is only expressed to be "subject to the Act." This seems to me strong to shew that it was not intended that all the previous Acts should apply. To make the new rule subject to them seems to me to do violence to the plain words of the Order, which only says that it is to be subject to the provisions of the Act.

Then the Order says that the costs are to be in the discretion of the Court. Does that mean that they are to be in their discretion, only subject to all the previous statutes? The words of the proviso are that, "where any action or issue is tried by a jury, the costs shall follow the event," unless upon application made at the trial, "for good cause shewn," it shall be ordered otherwise. It is contended that the event means, not the event of the cause in the ordinary sense, but the event according to each of the previous statutes that have made provision as to costs in different cases. That is not the natural meaning of the words. I cannot think the legislature would have used such words if they had meant to retain the provisions of all the previous Acts according to which, in many cases, the costs do not follow the event. There is no reason that I can see why we should go out of our way to give such a forced interpretation to words which, taken in the ordinary sense, give a plain and reasonable rule as to costs.

*Order absolute.*

Solicitors for plaintiff: *Vizard, Crowder, & Co., for Lynch & Teebay.*

Solicitors for defendant: *Johnson & Weatheralls, for Snowball, Copeman, & Smith.*

[IN THE COURT OF APPEAL.]

1877
*Feb.* 16.

JACKSON *v.* THE METROPOLITAN RAILWAY COMPANY.

*Negligence—Evidence—Accident—Railway—Disorderly Persons—Order.*

The plaintiff was a passenger by the defendants' railway, and at one station, though all the seats in the carriage in which the plaintiff was were filled, three more persons got in and stood up. There was no evidence that the defendants' servants were aware of this, but the plaintiff remonstrated with the persons who had so got in. At the next station, the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train:—

*Held*, by Cockburn, C.J., and Amphlett, J.A. (Kelly, C.B., and Bramwell, J.A., dissenting), affirming the decision of the Court of Common Pleas, that there was evidence from which the jury might infer negligence on the part of the defendants so as to entitle the plaintiff to recover damages.

Error in H. L. 14th Feb. 1878

THE plaintiff had brought an action against the defendants to recover damages for an injury done to his hand by the negligence of the defendants' servants, and at the trial he obtained a verdict.

The defendants, pursuant to leave reserved, moved for and obtained a rule nisi to enter a nonsuit or a verdict for the defendants, which was, after argument, discharged by the Court of Common Pleas. (1)

Notice of appeal to the Exchequer Chamber was given by the defendants, according to the Common Law Procedure Act, 1854, and the following are the facts as stated in the case on appeal.

1. The plaintiff, upon the 18th of July, 1872, about 8 p.m., took a third-class ticket from Moorgate Street to Westbourne Park, and entered a third-class carriage upon the defendants' railway. 2. The compartment in which the plaintiff travelled was gradually filled up as the train proceeded, and when it left the King's Cross Station all the seats were occupied. At Gower Street Station three more persons got in, and they were obliged to stand up. 3. There was no evidence to shew that the attention of the company's servants was drawn to the fact of the extra number being in the compartment, but there was evidence that the plaintiff

(1) Law Rep. 10 C. P. 49.

1877

JACKSON v. METROPOLITAN RAILWAY CO.

remonstrated at their getting in with the persons so getting in, and it was stated by a witness named Underwood, who travelled in the same compartment, that he did not see a guard or porter at Gower Street. 4. At Portland Road, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut, but there was no evidence to shew by whom either of these acts was done. 5. Just after the train had started there was a rush, and the door of the compartment in which the plaintiff was seated was opened a second time by persons trying to get in. 6. The plaintiff, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. 7. After the train had started, a porter pushed away the people who were trying to get in, and slammed the door to just as the train was entering the tunnel. At the same moment the plaintiff, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself; and at this moment, by the door being slammed to, the plaintiff's thumb was caught and injured.

The question for the decision of the Court of Appeal was, whether there was any evidence of negligence on the part of defendants' company to entitle the plaintiff to recover.

Dec. 13, 1876. *McIntyre, Q.C.*, and *Kemp*, for the defendants. This accident happened, in fact, because the porter did his duty, and if the plaintiff had kept his seat it would not have happened. No one was at that time trying to get into the carriage, and the presence of the three extra passengers had nothing to do with it. The company ought not to be made liable for an accident caused, if it was so caused, by the acts of disorderly persons.

[COCKBURN, C.J. If there had been any one in authority present, the disorder would probably have been prevented.]

*Macrae Moir*, and *Glyn*, for the plaintiff. The question is not whether the jury were right, but whether there was evidence to go to them: *Bridges* v. *North London Ry. Co.* (1); *Robson* v. *North Eastern Ry. Co.* (2); *Rose* v. *North Eastern Ry. Co.* (3) It is clear

(1) Law Rep. 7 H. L. 213. (2) 2 Q. B. D. 85.
(3) 2 Ex. D. 248.

that there was a crowd, and the porter ought to have been more careful in shutting the door.

*McIntyre, Q.C.*, in reply. From the nature of the traffic on the Metropolitan Railway, it must be conducted quickly, and it would be impossible to inspect every carriage at every station. Nothing stated amounts to negligence on the part of the defendants.

*Cur. adv. vult.*

Feb. 16, 1877. The following judgments were delivered: (1)—

AMPHLETT, J.A. The question we have to determine is, whether there was evidence before the jury from which they might reasonably infer that negligence on the part of the company caused or contributed to the injury for which the plaintiff seeks compensation. In considering this question, we must bear in mind that it is now settled by the case of *Bridges* v. *North London Ry. Co.* (2) (though previously doubted by many eminent judges) that the question whether in cases of this sort negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding judge.

The facts in the present instance were, in contemplation of an appeal to the Exchequer Chamber, embodied in the case before us, and it was contended before us by the counsel for the company that we could not, any more than the Exchequer Chamber under the old practice could, look at anything beyond the case. We felt obliged to yield assent to that contention, though, speaking for myself, with regret, because I have found it rather embarrassing to review the decision of the learned judges in the Court below in a case of this sort, when they had the advantage, which we have not, of seeing the evidence in extenso.

Confining myself, however, strictly to the statements in the case, I am of opinion that the first four paragraphs do not disclose any evidence of negligence on the part of the company. They would have done so if the three extra passengers had entered or continued in the plaintiff's compartment with the knowledge of any of the officers of the company, but it is expressly found that there was no evidence to shew that the attention of the company's

(1) These judgments were read by Baggallay, J.A.

(2) Law Rep. 7 H. L. 213.

1877

JACKSON v. METROPOLITAN RAILWAY CO.

servants was drawn to the fact; and I myself do not think that there was any negligence in the servants not discovering it for themselves, in the absence of any complaint or remonstrance from the passengers aggrieved; for I think it would be unreasonable to expect that every compartment in a long train should be visited at each station to see whether it was overcrowded. I think, therefore, that the presence of these three extra persons in the plaintiff's compartment was immaterial for the purposes of this inquiry, except so far as it would aggravate the inconvenience, and, possibly, injury, which would have resulted to the plaintiff, if still more passengers had got into the compartment at the Portland Road Station, and consequently tend to justify him, if any justification were wanted, in taking energetic measures to prevent it. I need not, however, dwell upon this, because it was not argued before us, nor, I believe, in the Court below, that there was any contributory negligence on the part of the plaintiff.

It remains to be considered whether there was any evidence of negligence on the part of the company with respect to the subsequent events at the Portland Road Station. They were as follows: Just after the train had started from that station there was a rush, and the door of the plaintiff's compartment (which had been before opened and then shut by some unknown persons at the station) was opened a second time by persons trying to get in. This was obviously a gross invasion of the plaintiff's rights as a passenger, and fully justified him in rising, as he did, partly from his seat and holding up his hand to prevent any more passengers from coming in. After the train had started, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel, which I understood was close to one end of the platform. This was, of course, after the door had been opened a second time; how long after is not stated in the case, but I think it may be presumed that the interval was somewhere about the time that the train took to pass from the place where it was stationary to the end of the platform next to the tunnel. What that distance was is not stated in the case, but it may obviously have been nearly the whole length of the platform, which seems to have been the view of my brother Grove, according to the note of his judgment.

Now, the slamming the door to by their porter—who, it may be observed in passing, is the only officer of the company on the platform of whom any mention is made in the case—was very probably the most prudent thing he could do for the safety of the passengers; but unfortunately at the same moment the plaintiff, by the motion of the carriage, fell forward, and, putting his hand upon one of the hinges of the door to save himself, received by the slamming of the door the injury complained of.

This being the history of the accident, there are two principal acts of negligence imputed to the company or their servants. First, it is said that although the slamming to of the door may have been proper and even necessary in itself, yet that, under the circumstances, since the porter from his position must have seen that the compartment was unusually crowded, he ought to have given some special warning before he slammed the door, and that the omission to do so was negligence. Without myself expressing any opinion upon this, I think it was eminently a proper question to be left to the jury. Secondly, it was said that even if there was no negligence in the slamming the door, which was the immediate cause of the accident, there was negligence on the part of the company in not preventing the "rush" of people on the platform, who opened the door for the purpose of illegally forcing an entrance into the compartment. I think this also was a proper question to be submitted to a jury, for I take it to be clear that it was the duty of the company to provide such a staff of officers on their platforms as, upon ordinary occasions, and when there was no sudden and unforeseen influx of people, would secure their passengers from such an outrage as has been described. There was no evidence that on this occasion there was any unusual number of passengers or others on the platform, or that there were any extraordinary circumstances which made it unreasonable to expect that the company should be able by its ordinary staff, however efficient, to control the movements of the people, and I think, therefore, that a jury might reasonably come to the conclusion that the state of things was on the evening in question normal and ordinary, and that it was the deficiency of the staff which made the commission of the outrage possible, and thus caused or contributed to the accident. It was said, indeed, that as the plaintiff

1877

JACKSON v. METROPOLITAN RAILWAY CO.

must make out his case, he ought to have given some evidence to negative the existence of any such extraordinary circumstances as might have excused the company. I do not agree with that proposition. The real state of things on the platform could only be proved by calling some of the officers of the company, which it would be unreasonable to expect the plaintiff to do.

Upon the whole, I am of opinion that the case was properly left to the jury, and as the presiding judge is not dissatisfied with the verdict, I agree with the decision of the Court below that it ought not to be disturbed.

BRAMWELL, J.A. I am of opinion that this judgment should be reversed; that there is no evidence of any negligence in the defendants or their servants, and that the supposed or surmised or inferred negligence did not cause the damage of which the plaintiff complains.

It is contended that *Bridges* v. *North London Ry. Co.* (1) shews that such cases as the present ought to be left to the jury. This would be so, if that case established that all complaints arising out of accidents in or on a railway ought to be so left. It has established nothing so absurd. It does not shew that if a man dies in a fit in a railway carriage there is a primâ facie case for his widow and children, nor that if he has a glass in his pocket and sits on it and hurts himself, there is something which calls for an answer or explanation from the company. But as it does not establish this, it furnishes no guide in these cases. For I agree with the Chief Baron (who has favoured me with his judgment) that it lays down no principle. Lord Cairns says: "I trust the case may be found useful in future as negativing the idea that under circumstances such as I have described a case is to be withdrawn from the jury." (2) Lord Hatherley says: "In this state of circumstances I think it would be very strong to say there was not evidence to go to the jury in this case." (3) I sincerely wish this case was governed by that, so that I might be spared the irksome and profitless task I have now before me. No doubt it is a guide in some, but cannot help us in all cases. I may observe, more-

(1) Law Rep. 7 H. L. 213. (2) Law Rep. 7 H. L. at p. 240.
(3) Law Rep. 7 H. L. at p. 242.

over, that the arguments in favour of the defendants are not noticed in the judgments, possibly because though they satisfied seven judges, they are not worthy of notice; also, that it is somewhat remarkable by what different roads the same conclusion in favour of the plaintiff was arrived at.

Deriving, then, no assistance from that case, I must proceed humbly by my own unaided faculties to examine the present case. It is impossible, as I have said, that wherever a passenger meets with an accident in a railway carriage the case must be left to the jury to find negligence or not. Sometimes it must be the duty of the judge to tell the jury they cannot find for the plaintiff, and sometimes to tell them that they must do so if they believe the witnesses. Suppose an expert is called, who proves that the accident arose from an axle breaking, and that it broke from a defect in the casting against which no skill in the manufacturer could guard, and which no care in the railway people could detect. Surely the judge must say there is no evidence of negligence or wrongful conduct in the railway company. On the other hand, if the expert proves that the defect was from careless casting, and that ordinary care in the railway people would have detected it, the judge must not leave that to the jury as a question for them, but tell them they are bound to find for the plaintiff, if they believe the witnesses. So in cases not requiring scientific knowledge, but depending on common knowledge and common sense, the principle is the same. Suppose it is proved that, an express train being due, the station master had a carriage shunted, trusting that the train might be a minute late. In such a case the jury ought to be told that negligence or misconduct is proved, and they must find for the plaintiff. On the other hand, suppose the accident was caused by a person maliciously dropping from a bridge over which there was a public footway, a piece of iron on the rails; equally in that case the jury ought to be directed to find for the defendants. I have hitherto supposed cases where the thing itself is proved which causes the damage, and which is or is not negligence or a wrongful act in the company. But there are other cases where the negligence is not proved or attempted to be proved directly, but where evidence is given from which it may be inferred. That was the case in *Bridges* v. *North London*

1877

JACKSON v. METROPOLITAN RAILWAY CO.

*Ry. Co.* (1) There the negligence of the driver, as some thought, was inferred from his not drawing up at the proper place. There was no evidence that he was not attending to his engine, that he was drunk, or was reading or looking at something as he passed, or was inattentive from some other cause or indifference; the evidence was of that nature from which such a cause might be inferred. In like manner it was inferred that it was from negligence that the porters called out the name of the station, and then allowed some time to elapse before they called out "Keep your seats." It was not shewn or proved that they were inattentive. But the principle is the same. If what is to be inferred is what is proved from the facts proved, the judge must say so. This is a case of that description. It was not proved that the train was too short or too long, the passengers too few or too many, the porters too few or too numerous, too inattentive or too attentive and eager in slamming the doors. All that is said is that there must have been or perhaps was some thing or things wrong. Now let us see what. The train may have been too small, so that there was no room for the three intruders; or too large, so that the three had not time to get beyond the first third-class carriage. Or it may have started too soon, giving not time enough to get in; or too late, and so people got out of the carriages, and had not time to get in again. Or there may have been too few porters to prevent what happened, or too many, and so they got in each other's way. In short, as the thing did not necessarily happen, it was preventible, and as the defendants did not prevent it they caused and permitted it. But it does not follow that they are guilty of negligence. No doubt by doubling the number of carriages, by letting passengers on to the platform one by one, by stopping at each station five minutes, by having a porter for every carriage or two or ten porters for every carriage, it would be possible to prevent persons getting into the carriages where there were no seats for them. But with precautions to insure this, and to make it absolutely certain, the traffic must stop. It would not pay the defendants to carry it on, nor be worth while for the public to make use of it. All that the public has a right to expect, all that the defendants undertake for, is that which is consistent

(1) Law Rep. 7 H. L. 213.

with practically working the railway. Does the intrusion of three men in a carriage already full afford any evidence that there is any failure of what is practically possible in the management of the railway? I say, no—I do not believe that any one in his conscience would say that he would censure or reprimand either the directors or manager of the company, or the porters at a particular station, on its being proved that three persons at that station had got into a carriage already full. How is it to be avoided? How can the porters see that a carriage into which people are getting is full? It would be very desirable that the jury at least should be put to do the porters' work for a week. But further assume there was negligence, or something wrong shewn by the fact that these men got in. I say the plaintiff has no right to complain of it. Because, had they got out again, it could not have been suggested, at least I suppose not, but perhaps it might, that their getting in had anything to do with the accident. But the plaintiff suffered them to be there without complaint. He probably found, as is often the case, that their presence was not inconvenient, and was not churlish enough to try and get them turned out. Now, as to the other negligence. Somebody opened the door and shut it, and some others made a rush at the door and opened it, but were pushed away by the porter. These things are not negligence in the defendants' servants, but are, it is said, evidence of it. That is to say, they shew that the train was not large enough, and did not stop long enough, and that there were not porters enough to prevent what happened. I shall not repeat what I have said on this point. Then the porter "slammed" the door. That is to say, he shut it very quickly. What was the man to do? It had been improperly opened. Was he to leave it open, or hang on and be taken through the tunnel outside, leaving his post? I am of opinion that there is no evidence of any negligence or improper conduct—no evidence of anything censurable or blamable—no evidence of anything that care and diligence could practically prevent—no evidence of any want of what the defendants undertake for and hold out to their customers—no evidence which would be allowed to make anybody or person liable, but a railway, or perhaps a tramway, or may be a steamboat company. And I

1877

JACKSON v. METROPOLITAN RAILWAY CO.

suppose it will hardly be said to be law that there is a special railway negligence. Supposing the evidence to be consistent with negligence, i.e. that negligence may have caused the matters, it is equally consistent with no negligence, i.e. that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that where the evidence is consistent as much with one state of facts as with another it proves neither.

As to the other question. Did these matters, or any of them, cause the accident? Let us examine the train of causation: 1. Negligence caused or allowed the intrusion of the three and their continuance in the carriage. 2. That caused an uneasy feeling in the plaintiff, making him more disposed to resist a further intrusion than he otherwise would have been. Now we begin a fresh train of causation—call it 1a. Negligence caused or allowed the people at Portland Road Station to open the door and to rush. Now the two causes combine. 3. This rushing, and the uneasy feeling so created, caused the plaintiff to rise to resist the coming in of the rushers. 4. His rising, coupled with the motion of the carriage, caused him to lose his balance. 5. That caused him to put his hand out to save himself. 6. That, and the slamming of the door, caused his thumb to be hurt. Mr. Justice Grove says it is not easy to lay down a rule in such a matter; but does any rule, any definition ever yet attempted, include such a case? Is what happened in any sense the natural consequence of its alleged cause? Was it causa proxima or remotissima? Suppose the plaintiff had fallen on an open knife held by a passenger opposite, and been killed, would that have been caused by the defendants, and so a primâ facie case of manslaughter? Suppose the plaintiff sued the rushers, and said, "You caused my thumb to be pinched." I do not say such an action would not be maintainable, but could he prove such causing?

I am of opinion that this appeal should be allowed. The plaintiff might as well rely on a crowding when he was a passenger a month before, and say that a then crowding caused an uneasy feeling which made him get up to resist the rushers. Or if crowded in railway A, and hurt by rushers in railway B, he might say that A caused it. As to the judgments of the Court below, I say it with all respect, I rely on them. It is impossible that

those who delivered them could have delivered such judgments had the case been well-founded. It is manifest to me that they considered that *Bridges' Case* (1) set them the task of finding an excuse for a foolish and unjust verdict. That task, of course, they performed with the greatest ability, but very differently to what it would have been done had they thought their duty was to find reasons the other way.

KELLY, C.B. I confine myself, as I conceive I am bound to do, to the printed case before us, upon which the question arises, whether there was any evidence of negligence by the company to go to the jury, and if so, whether the injury sustained by the plaintiff was caused by such negligence. It is necessary to consider the facts of the case in the order of time in which they occurred. And, first, the plaintiff being a third-class passenger from Moorgate Street to Westbourne Park, and having arrived at the Gower Street Station, and all the seats in his compartment being filled, "three more persons got in, and they were obliged to stand up." "There was no evidence to shew that the attention of the company's servants was drawn to the fact of the extra number being in the compartment." This fact appears to me to be of itself no evidence of negligence. If the intruders entered the carriage unseen and unknown to the company's servants, their act can be no evidence of negligence on the part of the company, unless it were also proved that the number of company's servants upon the platform was insufficient, or that something else occurred which made it negligence in the company's servants that these three persons entered the carriage. And if any such fact existed it was incumbent upon the plaintiff to prove it, as the plaintiff is bound to make out his case, and to adduce evidence of any fact which would render another fact, not evidence in itself, when the two facts are taken together, some evidence of negligence for a jury.

It was well observed by the Lord Chief Justice during the argument, that although it would be difficult for any of the company's servants to prevent by force three men from entering a compartment, yet if a policeman or one in authority had requested them

(1) Law Rep. 7 H. L. 213.

1877

JACKSON v. METROPOLITAN RAILWAY CO.

to desist, he would probably have been obeyed. But there was no evidence, and, indeed, the contrary is found upon the case, that either the company's servants or any one else noticed the entry of the three men into the carriage; and, as before observed, there was no evidence of insufficiency in the number of servants in attendance.

The next fact is, that upon the arrival of the train at Portland Road, the next station, the door of the compartment was opened and then shut, but with no evidence to shew by whom either act was done. This is clearly no evidence of anything done or omitted to be done by the company, and was probably the act of some one who wished to enter the compartment, but finding it full shut the door and went elsewhere. But "just after the train had started there was a rush, and the door of the compartment in which the plaintiff was seated was opened a second time by persons trying to get in." This fact is contended to be evidence of negligence on the part of the company, but upon the assumption, which is entirely unsupported by the printed case, that the "rush" was made by a multitude of persons, who had come upon the platform, and whom the company ought not to have permitted to assemble there in such numbers: and so that they were guilty of negligence. But there is no evidence at all that there were any greater number of persons upon the platform than those who attempted to enter the compartment, and this cannot have exceeded two or three in number, because they were effectually prevented from entering the compartment by a single porter, who pushed them away and then closed the door. Thus far, then, I see no evidence at all of any negligence either by act or omission on the part of the company or their servants. But we now come to the act of the plaintiff himself, and to the evidence touching the inflicting of the injury of which he complains. And the evidence stands thus: Just after the train had started, and when the "rush" was made, the door was opened by the persons who tried to get in. Then the plaintiff, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. At the same moment the plaintiff, by the motion of the train, fell forward, and to save himself placed his hand upon one of the hinges, and his thumb was caught and injured upon the slamming of the door by the porter. Now, here the rising from his seat

when the train was in motion, and the putting of his hand upon one of the hinges, were the acts of the plaintiff, and of the plaintiff alone; and not only were these acts of the plaintiff himself no evidence against the company, but they might, if it were necessary to raise such a question, be evidence of contributory negligence by the plaintiff himself. And the only act done by the company or their servants, which in any way conduced to the inflicting of the injury, was the slamming of the door by the porter. Now, is the slamming by the porter of the door which had been opened by some wrongdoer while the train was in motion, and when it was about to enter a tunnel, any evidence of negligence against him or the company? It is not pretended that he knew, or had any reason to suspect, that plaintiff's thumb was between the door and the body of the carriage; and I am, therefore, clearly of opinion that not only is it no evidence of negligence, but that he would have been guilty of negligence if he had acted otherwise, and omitted or failed to have shut a door which had been improperly opened while the train was in motion: especially when the train was about to enter a tunnel, where, if any one had fallen out in consequence of the door being left open, the company would have been justly charged with negligence by reason of the porter, their servant, having failed to shut the door. When, therefore, we consider attentively the several facts stated in the printed case as they occurred in succession down to the infliction of the injury, no one of them appears, nor do the whole of them taken together appear, to affect the company with negligence; but, on the contrary, the only act done throughout by any servant of the company was the shutting of the door when the train was about to enter the tunnel—an act which it was clearly the duty of the porter to do.

It may be added that, even if it be possible to impute negligence to the company in all or any of the acts enumerated, it seems to me impossible to contend with effect that any one or all of those acts taken together was or were the cause of the injury sustained by the plaintiff. The injury was clearly caused solely by the act of the plaintiff himself, in imprudently rising while the train was in motion and attempting to prevent the entry of the intruders; and all that conduced to it on the part of the company was the act

1877

JACKSON v. METROPOLITAN RAILWAY CO.

of the porter in closing the door—an act which, as I have observed, appears to me to have been incontestably his duty to do.

The case of *Bridges* v. *North London Ry. Co.* (1), in which no principle whatever affecting cases of negligence in general was laid down either in the Exchequer Chamber or in the House of Lords, and which turned altogether upon a number of totally different facts, seems to me to have no application to the present case. There the company had left a large and hard heap of rubbish in a dark tunnel, upon a spot at which the person who was mortally injured had alighted, and inasmuch as it was known to the company that (the train in question being much longer than the platform) some of the carriages must be left behind within the tunnel, I cannot conceive how the company could escape the charge of negligence, unless they had provided some means by which the passengers in the two carriages left in the tunnel might have alighted in safety, or unless they had given some warning to them not to alight at all, but to keep their seats. On the contrary, however, the evidence was clear and positive that when the train stopped the cry was heard upon the platform "Highbury!" by which a passenger in another compartment within the tunnel was induced to alight, and by which it can scarcely be doubted that the sufferer in the other carriage was also induced to alight; and it was not until after both must have alighted, and the person injured had alighted against or upon the heap of rubbish by which his death was occasioned, that the second cry was heard, "Keep your seats!" Neither this case nor any other case that I am aware of at all resembles that which is now before the Court; and, upon these grounds, I am of opinion that the judgment of the Court of Common Pleas should be reversed, and that a nonsuit should be entered.

COCKBURN, C.J. I am of opinion that the judgment of the Court of Common Pleas in this case should be upheld, and this appeal dismissed.

The only question for our decision is that on which leave to move was reserved at the trial, namely, whether there was any evidence of negligence to go to the jury. In the Court below there

(1) Law Rep. 7 H. L. 213.

was the further question on the rule nisi, whether the verdict was or was not against the weight of evidence; and the decision was in favour of the plaintiff. But with this part of the case we have no concern beyond this, that if the evidence is sufficient to support the verdict, à fortiori it must have been such as should be submitted to the jury. The two questions however must not be confounded. Even if we should be led to think that the verdict should have been for the defendants, we must not allow that opinion to sway our judgment on the only question submitted to us, namely, whether there was any evidence to be left to the jury. And there is the greater reason for saying so since the law on this subject was finally settled by the judgment of the House of Lords in the case of *Bridges* v. *North London Ry. Co.* (1) Prior to this decision, judges were sometimes in the habit of dealing with the question of negligence as one in which it was competent to the judge at the trial, and therefore to the Court in banc, to determine whether the facts proved constituted negligence or not. The decision of the House of Lords has placed the matter on what I cannot but think is the right footing. The question of negligence is one, not of law but of fact, and, like every other question of fact, is for the jury and not for the judge. Not that the proper functions of the judge are at all infringed on by the decision just referred to. It still remains with the judge on this, as on any other issue of fact, to determine whether there is evidence to go to the jury. It is still the province of the Court in banc to determine, on motion for a new trial, whether the verdict is according to the weight of the evidence, and if it be not, to order a new trial and submit the question to another jury. But this is the only course open. The question of negligence, if there be any evidence to be submitted to the jury, is for the jury alone, and must be decided by the jury as a question of fact. Judges must therefore now be careful both in deciding whether there is evidence to be left to the jury, and whether the verdict is in accordance with the evidence; as also that in so deciding they do not permit their individual views on the subject of negligence to control or supersede the decision of the jury, on a matter which it is exclusively the province of the jury to determine as a question of fact.

As set forth in the statement of the case before us, the facts are

(1) Law Rep. 7 H. L. 213.

1877

JACKSON v. METROPOLITAN RAILWAY CO.

these: The plaintiff was a passenger by a train of the defendants, which was proceeding to the westward. On the arrival of the train at the Gower Street Station three persons forced their way into the compartment in which the plaintiff was riding, and which was already full. The intruders had therefore to stand upright in the carriage as the train went on, which of course they could not do without occasioning discomfort and annoyance to the other passengers. On the train arriving at the Portland Road Station (the next in order), not only were these supernumerary passengers not removed, but just as the train was starting several other persons made a rush towards the carriage, opened the door, and tried to get in. The plaintiff then partly rose from his seat, and holding up his hand endeavoured to prevent them. In this state of things a porter came up, pushed away the people who were trying to get into the carriage, and slammed to the door. At this moment the onward movement of the train caused the plaintiff, who was partly standing, to fall forward, when, to save himself from falling, he put his hand upon one of the hinges of the door. This happening at the moment when the porter slammed the door, the plaintiff's thumb was caught in the door and severely injured.

In dealing with the facts, on reviewing the judgments delivered in the Court of Common Pleas, I find myself somewhat hampered by the circumstance that that Court, in forming its judgment, appears to have had facts before it which are not before us. In that Court the knowledge of the facts was derived from the judge's notes of the evidence, whereas, in conformity with the procedure which existed at the time when this appeal was entered, we are confined to the case stated by the learned judge who tried the cause. On reading the judgments delivered in the Court below, I find the judges, and among them Mr. Justice Brett himself, by whom the case before us has been stated, adverting to facts which appear to me very material, but which are not mentioned in the case as stated. There the presence of a crowd on the platform at the Portland Road Station, and the inadequacy of the staff to maintain order, are dwelt upon by the judges, but are omitted in the case as stated. Nevertheless it seems to me that enough is stated to warrant the conclusion that a case was made out by the plaintiff, which he was entitled to have submitted to the jury. Moreover, I am led to think that the facts, the omission of which

I regret, may be gathered inferentially from those expressly stated in the case itself.

In dealing with the facts, I must begin by saying that, in my opinion, the intrusion of the three unauthorized persons into the compartment at the Gower Street Station affords primâ facie evidence of negligence on the part of the company's servants. I take it to be part of the duty of a railway company which invites persons to resort to its stations and to travel by its trains (inter alia) to provide two things: first, sufficient accommodation to meet the ordinary requirements of the traffic; secondly, a sufficient staff to maintain order and prevent irregularity and confusion, and to protect passengers from annoyance, inconvenience, or injury from travellers who set not only the regulations of the company but also decency and order at defiance. But the intrusion of persons into a carriage already full implies the absence both of carriage accommodation and of a sufficient number of officers to maintain order, or, what comes to the same thing, a neglect of their duty in this respect. Such an occurrence as that of persons forcing their way into a compartment already full, and travelling standing, to the unavoidable discomfort and inconvenience of the rest of the passengers, does not, so far as my experience goes, occur on well-conducted lines of railway. It cannot be doubted that if such a thing were of frequent occurrence it would give rise to loud expostulation and complaint; and if an injury were to arise from an instance of it on a line on which it was of frequent occurrence, a company would be deemed guilty of neglect of duty for leaving such a state of things to exist. But that which would undoubtedly be reprehensible as a general practice should be prevented in the particular instance, if this can be done by reasonable care. It appears to me, subject to an observation I shall have to make presently, that the suffering three persons to make their way into a carriage in which there was no room, and allowing the train to proceed while such was the case, affords, to say the least of it, primâ facie evidence of negligence which calls for an answer. Nor, as I shall explain presently, does their negligence, inasmuch as it has, I think, contributed to the accident, appear to me to be too remote to make the company liable.

But the negligence becomes more aggravated, as also more

1877

JACKSON v. METROPOLITAN RAILWAY CO.

immediately proximate, as we advance. The train arrives at the Portland Road Station, the three supernumerary passengers still remaining standing upright in the compartment, and with things in this condition it is again allowed to proceed on its way, leaving the plaintiff and his fellow-travellers subject to a continuance of the discomfort and annoyance which the presence of persons standing upright in the carriage would necessarily occasion. This fact seems to me to imply the absence of such a superintendence and supervision of the carriages composing the train as a railway company is, in my opinion, bound to exercise. Moreover, the discomfort and inconvenience to which the plaintiff and his fellow-travellers were exposed was such as no one would submit to longer than he could help; and the fact that the train was despatched before any complaint was made leads to the inference either that the train was sent on with undue haste, as well as without attention being directed to see that all was in order, or that there was no official on the platform to whom complaint might be addressed. We now arrive at the climax. As the train is just getting into motion several persons run after it, and having opened the door of the compartment in which the plaintiff was, endeavour to scramble in. The plaintiff, thinking, as well he might, that the presence of any more supernumeraries would be an intolerable nuisance, rises to prevent their entrance. He falls forward, just as the porter, having pushed aside the intruders, closed the door in haste, and so the accident happens. From these facts, as it seems to me, two or three inferences may be drawn. In the first place, I infer from the rash effort of the people to get into the train when in motion that there was here again an absence of sufficient carriage accommodation, or that more tickets had been issued than an ordinary train could accommodate, in which case there would most likely be an accumulation of persons on the platform, and some confusion and disorder among them. The rush of the persons after the train, and the pursuit of them by the porter, seem to point to riotous and disorderly conduct, and to the absence of a sufficient force to maintain order and to protect persons on the platform or in the train from annoyance or injury. A jury might, I think, fairly infer that the arrangements of the company were defective: that either they had failed to pro-

vide accommodation to the extent which the traffic might reasonably be expected to require, or had inconsiderately issued a larger number of tickets than was consistent with the accommodation provided, and hence had led to an accumulation of persons on the platform larger than their staff was competent to keep in order; or, as only a single porter appears to have been seen, the jury might have considered the staff insufficient even for ordinary purposes, and, ascribing the accident to the insufficiency of force to prevent those persons from their attempt to get into the train, might have considered this insufficiency as the proximate cause of the accident which ensued.

I am far from saying that the inferences to be drawn from these facts might not have been rebutted. It may have been that the accommodation afforded may not have been inadequate to the ordinary and average requirements of the traffic. It may have been that the number of persons to be conveyed and the crowd accumulated on the platform may have been due to exceptional and unforeseen circumstances. It may have been that the supernumerary passengers eluded the vigilance of the company's servants at the Gower Street Station, or made their way into the carriage when the train was in motion and when it was too late to stop them. It may have been that the undue accumulation of persons on the platform at the Portland Road Station arose from the number of persons holding return tickets, and that, though the ordinary staff was sufficient for the ordinary traffic, it was insufficient to cope with the exceptional circumstances which presented themselves on this occasion. But the question is, whether it was not for the defendants to shew any such unusual and exceptional state of things. No explanatory evidence was adduced on their part to rebut the presumption arising from the facts proved by the plaintiff; and, in the entire absence of any such evidence, it seems to me impossible to say that the admitted facts were not such as that from them the jury might infer, though, of course, it was open to them to take the opposite view, that there had been negligence on the part of the company's servants. In the absence of any rebutting or explanatory evidence, I cannot think it is open to us to speculate on possible circumstances which might thus have afforded an answer to the plaintiff's

1877

JACKSON v. METROPOLITAN RAILWAY CO.

case, or which, as matter of speculative possibility, it was open to the jury, even in the absence of such evidence, to take into account. In the absence of all explanation on the part of the defendants, I am decidedly of opinion that it would not have been consistent with the duty of the judge to withdraw the question of negligence from the jury. Whether the negligence, of which primâ facie evidence was thus given, can be deemed to have led to the accident for which it is sought to make the company responsible, is a different matter, which remains to be considered.

But I must advert to a strange argument which was urged upon us on behalf of the defendants. It was said that this was a line of railway the business of which was carried on upon peculiar and exceptional principles, and on which, in the interest of those usually travelling on it, despatch and the saving of time were the paramount and sole consideration, to which comfort, and even safety, were to be made subordinate, and that hence it was impossible, as those using the line must be aware, to exercise the superintendence and controul which could be exercised on other lines of railway. Of all this no evidence was given, but it was alleged to be matter of notoriety. Assuming it to be so, more than one answer can, as it seems to me, be given to the argument. In the first place, any such departure from the principles on which all well-conducted lines of railway are managed is not to be presumed to be known to, or acquiesced in by, the individual passenger who complains of an injury through negligence. To make good such a defence it must be shewn that he was aware of, and acquiesced in, so exceptional a mode of conducting the traffic of the line, which perhaps might be inferred from his having frequently travelled by it. In the second place, it may be answered that if the company so regulate the movement of their trains as to allow, at each station at which their trains stop, no more than sufficient time to enable one set of passengers to scramble out of, and another set of passengers to scramble into, the carriages as best they may, it behoves them to have an additional number of servants to superintend the carriages, and see to the safety and accommodation of the persons travelling by the train. But the final and conclusive answer is, that if the system thus pursued affords any excuse for so striking a departure from the safer rules on which all other railways are conducted, this was

matter for the consideration of the jury. It was either submitted to them or it was not. If it was, it was for the jury to judge of its effect, and we are not called upon to decide on the propriety of their verdict. If it was not, still less should we be warranted in giving effect to it, our sole province being to say whether there was evidence to be left to the jury, not to take into account what might have been said in answer, but was not.

All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with that negligence as its cause, or as materially contributing thereto. I cannot doubt, especially after the decision of the House of Lords in *Bridges* v. *North London Ry. Co.* (1), that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding judge to leave to their decision. The continued presence of the supernumerary passengers, which in the absence of explanation might well be attributed to negligence, probably led to the resistance of the plaintiff to the intrusion of others which he might otherwise have tolerated without resistance, as he did the entrance of those at Gower Street, and may thus have materially contributed to the result. The attempt of the persons at the Portland Road Station, if the jury were of opinion that their being enabled to make the attempt was attributable to negligence in the company's servants, was the immediate occasion of the closing of the door by the porter, to whom, I think, no blame can properly be attached for so doing, and thus was the proximate cause of the injury of which the plaintiff complains. I am wholly at a loss to see how it can be said that this was a question which, upon the evidence before them, it was not within the competency of the jury to decide, or which would properly have been withdrawn from their consideration.

I am therefore of opinion that the decision of the Court of Common Pleas was right, and that the appeal must consequently be dismissed.

*Judgment affirmed.*

Solicitor for plaintiff: *W. W. King.*

Solicitors for defendants: *Burchells.*

(1) Law Rep. 7 H. L. 213.

1877
*Jan.* 11.

## HART and Another *v.* WALL.

*Libel, in the Nature of Slander of Title—Special Damage.*

The plaintiffs, vocalists, advertised in a theatrical newspaper, as follows:—"The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co." (music publishers), "and others, for their kind unhesitating permission to sing any morceaux from their musical publications." The defendant, who was interested as agent for the proprietors of the "stage-right" of certain songs published by the firms mentioned, wrote to the proprietors of two music halls at which the plaintiffs were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties under the Copyright Act, inasmuch as the publishers named had in some instances no power to give the alleged permission, and insinuating that music hall singing was not calculated to create a demand for their musical publications. Upon a motion to set aside a nonsuit:—

*Held*, that, inasmuch as the letters were reasonably susceptible of a construction which would make them libellous, the opinion of the jury ought to have been taken upon their meaning.

Claim. 1. The plaintiffs were at the times hereinafter mentioned, and still are, vocalists, and had been and were engaged to sing at The Sun Music Hall, Knightsbridge, and also at The London Pavilion Music Hall, for reward payable to the plaintiffs for their services, and they appeared and sang in public under the name of The Sisters Hartridge.

2. On the 15th of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Williams, Esq., the proprietor of the Sun Music Hall, of the plaintiffs and of them as such vocalists, and of their engagement at the Sun Music Hall, the words following, that is to say,—"January 15th, 1876. E. Williams, Esq. My dear Sir,—Although I know it is quite unintentional on the part of the lady advertisers (meaning the plaintiffs), the advertisement attached at foot, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the Copyright Act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyrights vested in them, and a separate and distinct

1877

HART v. WALL.

property never held by them. If all proprietors knew this, it would be best; but I have not time to apprise them. I remain, yours truly, H. Wall;" meaning that the plaintiffs had no right to sing certain songs which they advertized themselves as about to sing at the said Music Hall.

3. In consequence thereof, and by the publication of the said words, E. Williams dismissed the plaintiffs from his service and terminated the said engagement at the Sun Music Hall.

4. On the 19th of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Loibl, Esq., the proprietor of the Pavilion Music Hall, of the plaintiffs, and of them as such vocalists, and their engagements at the said Music Hall, the words following, that is to say,—"January 19th, 1876. E. Loibl, Esq. Dear Sir,—That you may not be misled, I beg to state, that, with reference to an advertisement in the last *Era*, where the Misses Hartridge (meaning the plaintiffs) give notice that they have received unhesitating permission to perform any morceaux from any publication of certain publishers therein mentioned, it would be as well for you to know that, if two of the firms really had pretended to have given such unqualified sanction, that I hold powers of attorney over certain publications issued by them as to the sole liberty of public performance, which right they never possessed. But Messrs. Chappell & Co.'s representative to-day informed me that they only granted permission for two songs in particular (which were named), and they were not aware it was for music-hall singing, as they have a poor opinion of such creating any demand for their publications; and moreover that they require the advertisement to be altered. And Messrs. Metzler & Co.'s representative, in the presence and hearing of Mr. Brown (the head man of Mr. Cunningham Boosey) yesterday stated to me that he had granted no permission whatever, but, on the contrary, that they had informed the ladies (meaning the plaintiffs) their charge for such permission would be 7*s.* per night (2*l.* 2*s.* per week), as much again as Messrs. Boosey named" (meaning that the plaintiffs had advertized themselves to sing at the said music hall songs which they had no right to sing).

5. In consequence of the publication of these words, E. Loibl

1877

HART v. WALL.

dismissed the plaintiffs from his service, and dispensed with their services and refused to employ them to sing at the said music hall; and the plaintiffs were and are by means of the premises otherwise injured.

Claim 100*l.* damages.

Defence, 1. The defendant denies the whole of the allegations contained in the first paragraph of the statement of claim.

2. The defendant denies the allegations contained in paragraphs 2, 3, 4, and 5 of the said statement of claim.

3. The defendant further denies that the alleged libels and each of them as disclosed in paragraphs 2 and 4 respectively were written and published as therein alleged.

4. The defendant further says that the alleged libels and each or either of them were privileged communications written by the defendant under the protection of privilege.

5. The defendant further says that the alleged libels and each or either of them, and each and certain part or parts thereof, were true in substance and in fact.

Joinder of issue.

The cause was tried before Archibald, J., at the last Trinity Sittings in London. It appeared that the defendant was agent for the proprietors of various musical and dramatic copyrights, receiving (generally under powers of attorney) the fees or allowances usually paid to the authors or proprietors of such copyrights for their representation in theatres or concert rooms. Seeing an advertisement of the plaintiffs in the *Era* newspaper of the 16th of January, 1876, to the following effect,—"The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co., and others, for their kind unhesitating permission to sing any morceaux from their musical publications,"—the defendant addressed the letters set out in the statement of claim to the two gentlemen therein mentioned respectively.

It was admitted on the part of the plaintiffs that the defendant had not written anything untrue to his knowledge; and on the part of the defendant it was submitted that the letters were not libellous.

The learned judge, after consulting Quain, J., nonsuited the plaintiffs.

July 24. *Glynn* obtained an order nisi for a new trial, on the ground that "the statement of claim disclosed a libel."

Jan. 11, 1877. *Philbrick, Q.C.*, shewed cause. The letters contain nothing which is at all derogatory to the plaintiffs, no reflection upon their characters moral or professional. Nor can they be relied on as being in the nature of slander of title: that sort of action can only be maintained where there is malice; damage only is not enough: *Brook* v. *Rawl.* (1) The first letter amounts only to a caution: and the second was meant as a warning to the proprietors of places of public entertainment that the advertisement of the Sisters Hartridge was not to be implicitly relied on. [*Young* v. *Macrae* (2) and *Wren* v. *Weild* (3) were also cited.]

*Talfourd Salter, Q.C.*, and *C. Scott*, contrà, were not called upon.

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. The two letters in question were addressed by the defendant to the proprietors of two places of musical entertainment with whom the plaintiffs had professional engagements. The cause of the writing of the letters was an advertisement published by the plaintiffs in the *Era* newspaper, to the following effect,—"The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co., and others, for their kind unhesitating permission to sing any morceaux from their musical publications." It is not denied that the fair construction of that advertisement may be, that the plaintiffs think they have permission from the publishers named to sing in public any songs published by them, as to which they have authority to give them such permission, and not songs as to which they have no such authority. The question is not whether the letters are susceptible of an innocent interpretation, but whether no libellous construction can reasonably be put upon them; for, if such a construction may reasonably be given to them, it is for the jury to say whether or not that is the true interpretation of them; and that question should not have been withheld from them. Now, it appears to me that both letters are susceptible of two constructions, the one

(1) 4 Ex. 521; 19 L. J. (Ex.) 114. (2) 3 B. & S. 264; 32 L. J. (Q.B.) 6.
(3) Law Rep. 4 Q. B. 730.

1877

HART v. WALL.

an innocent the other a libellous construction. If it had been left to the jury and they had found that the construction put upon the letters by Mr. Philbrick was the proper one, I am not prepared to say that I should not have assented to it. But it is not unreasonable to say that the letters are also open to this construction,—These ladies have stated in their advertisement that which is not true. They have vouched Messrs. Chappell & Co. and Messrs. Metzler & Co. as having given them permission to sing any songs published by them, whereas those gentlemen have no right to give such permission; and, if you rely upon the advertisement and act upon that statement, you (the persons to whom the letters are addressed) may get into difficulties. It was clearly matter for a jury. I quite agree that the fact of damage having followed from the publication of the letters is immaterial in considering what is the construction of them. If the letters are capable of the construction I have put upon them, they should have been left to the jury. This was not done, and consequently there must be a new trial.

LINDLEY, J. I am of the same opinion, and for the same reasons. The letters in question are reasonably susceptible of two constructions, one of which would be libellous, the other not. It is quite consistent with the letters, coupled with the advertisement, that the defendant was not acting bonâ fide, but in writing the letters was prompted by malicious motives. If he really had in view only the protection of his own rights, or the rights of others on whose behalf he was acting, he should have stated what particular songs he wished to protect.

*Order absolute.*

Solicitors for plaintiffs: *Thomas Beard & Son.*
Solicitor for defendant: *T. L. Allen.*

[IN THE COURT OF APPEAL.]

1877
*Feb.* 6.

CHARLES AND ANOTHER *v.* BLACKWELL AND ANOTHER.

*Cheque—Banker—Order—Indorsement by Agent—Payment—Authority—* 16 & 17 *Vict. c.* 59, *s.* 19.

An indorsement of a cheque payable to order, purporting to be by the agent of the person to whose order the cheque is payable, is, within 16 & 17 Vict. c. 59, s. 19, a sufficient authority to the banker to pay the amount of such cheque, though the person who indorsed the cheque had no authority to indorse.

S. K., an agent of S. & Co., the plaintiffs, having authority to sell goods for them and to receive payment by cash or cheque, but not having authority to indorse cheques, received from the defendants, in payment for goods supplied, a cheque on their bankers drawn payable to S. & Co., or order. S. K. indorsed it "S. & Co., per S. K., agent," received the money from the bankers, and misappropriated part of it. The bankers returned the cheque to the defendants, and the amount was allowed in account by the defendants:—

*Held*, affirming the decision of the Common Pleas Division, that such payment by the bankers was within the protection of 16 & 17 Vict. c. 59, s. 19; and that the plaintiffs could not maintain an action against the defendants, either for the price of the goods or for the cheque.

APPEAL from the decision of the Common Pleas Division discharging an order for a new trial.

The action was for the conversion of a cheque, with a count upon the cheque and a count for goods sold, &c.

Plea, amongst others, not guilty.

The cause was tried before Lord Coleridge, C.J., at the Michaelmas London Sittings, 1875, and the facts, according to the evidence for the plaintiffs, were as follows:—The plaintiffs carried on business in Milk Street, London, under the name of Charles & Co. They had started a separate business in Jewin Street, under the name of Smith & Co., which was managed by one Samuel Kingsford as their agent. In November, 1874, the defendants had bought goods from Smith & Co., and the invoices were sent to the defendants through Kingsford. The defendants paid for the goods by two cheques, one for 350*l.*, and one for 150*l.*, drawn by the defendants on the London and County Bank, and made payable to "Smith & Co., or order." Kingsford indorsed them "Smith & Co. per S. Kingsford, agent," and obtained payment of the money from the London and County Bank. The cheque was returned

1877

CHARLES v. BLACKWELL.

by the bankers to the defendants, and the amount was allowed in account by the defendants. Kingsford became a defaulter to the plaintiffs to the extent of 262*l.*, which sum this action was in fact brought to recover. Mr. Charles, one of the plaintiffs, admitted that Kingsford had authority to receive payment for goods on their account in cash or by cheque, but denied that he had authority to indorse cheques.

The evidence is stated in detail in the judgment of the Court.

After the first witness for the plaintiffs had been examined, Lord Coleridge, C.J., expressed his opinion that even if all the witness had stated was true, the plaintiffs had no case. The counsel for the plaintiffs admitted that their other witnesses would not carry the case further. The counsel for the defendants said they had a complete answer, and would not consent to any leave being reserved to enter a verdict, but would accept a nonsuit. The Chief Justice thereupon directed a nonsuit, some admissions being made on both sides, amongst which was an admission by the defendants that Kingsford had no authority to indorse cheques.

The plaintiffs obtained an order nisi for a new trial, which order was discharged by the Common Pleas Division. (1)

The plaintiffs appealed.

Jan. 30. *Herschell, Q.C.*, and *Lumley Smith*, for the plaintiffs. If this indorsement is sufficient, there is no protection in making a cheque payable to order. But for the Stamp Act, 16 & 17 Vict. c. 59, s. 19, (2) the case would be plain, and the bankers would clearly be liable. The Act does not protect the bankers, for the cheque does not purport to be indorsed by the payee. It is not true that the Act meant merely to give the protection of the fear of punishment for forgery. When the Act was passed such an indorsement was not a forgery, and it was only made so by a subsequent statute, 24 & 25 Vict. c. 98, s. 24. The banker was not bound to pay on such an indorsement, and might have required time for inquiry to be given.

[COCKBURN, C.J. Would not the banker have been liable to an action?]

Not if he only waited till he could inquire; on any other

(1) 1 C. P. D. 548. (2) The section is set out in the judgment, post, p. 155.

doctrine a most unfair liability would be imposed on the banker. Besides, the Stamp Act only applies as between the banker and his customer, and does not affect any one else. This cheque has, in fact, not been paid; it still belongs to the plaintiffs, and can be recovered in trover. The plaintiffs can then sue upon it, and the bankers have their remedy against Kingsford. The Plaintiffs can also recover for the price of their goods. Money paid on a forged indorsement can be followed: *Ogden* v. *Benas.* (1) *Cookson* v. *Bank of England* (2) can scarcely be relied on, and has been disapproved of. The Act cannot have meant that a cheque made payable to the order of one person will, when endorsed by any person, become payable to bearer. No doubt Kingsford was the plaintiffs' agent, but that does not signify, unless he had authority to indorse cheques.

*Murphy, Q.C.*, and *Channell*, for the defendants. The plaintiffs by their conduct invited the defendants to trust Kingsford; if the defendants had not been stopped by the judge at the trial they could have shewn that there was a perfect answer to the action, and that they were fully authorized by the plaintiffs to pay in this manner. If the plaintiffs think that they can recover on the cheque, let them bring their action against the bankers, and give secondary evidence as to the cheque. The statute was not intended to give any additional protection to the seller of goods, and was merely for the protection of the banker. At all events, the plaintiffs' agent has received the money for the cheque, and has carried it to account, exactly as he would have done if the defendants had paid in cash or by a cheque payable to bearer. The defendants might have paid in that way, and only made the cheque in this form in order to get a receipt and as a precaution. The statute must have intended to include indorsements by agents; for firms and corporations cannot indorse in any other way. To come to any other decision would throw a heavy onus on bankers, whereas by holding the indorsement good, the plaintiffs only bear the ordinary penalty of having a dishonest servant. The defendants had nothing to do with any one but Kingsford, and when once by any means their money got into his hands, the goods were paid for. If the bankers had come to the defendants,

(1) Law Rep. 9 C. P. 513. (2) 13 Ir. C. L. Rep. at p. 438.

1877

CHARLES v. BLACKWELL.

and had asked whether they were to pay on that indorsement, they would have been told to pay, and surely that would have been a good payment.

*Herschell, Q.C.*, in reply, cited *Alexander* v. *Mackenzie.* (1)

*Cur. adv. vult.*

Feb. 16. The judgment of the Court (Cockburn, C.J., Mellish, L.J., and Baggallay, and Bramwell, JJ.A.), was delivered by

COCKBURN, C.J. This is a case of considerable importance to the mercantile world, and especially to bankers, and it is one of some nicety. The facts are as follows:—

The plaintiffs in the Court below, the appellants here, carried on business in Milk Street. Apart from their proper establishment, they also carried on, under the style of Smith & Co., a separate business in Jewin Street, through the agency of one Kingsford, who had the general management of this business, with authority to sell goods and to receive payment for them, not only in cash, but also in cheques; but who, it was admitted, had no authority to indorse cheques made payable to the order of Smith & Co. The defendants having been supplied with goods by Kingsford, on behalf of Smith & Co., invoices were prepared by Smith & Co., in the following form:—"Bought of Smith & Co., merchants, London," and in the margin, "Agent, S. Kingsford, Jewin Street." These invoices were sent to Kingsford, and were forwarded by him to the defendants. The latter delivered to Kingsford in payment a cheque on their bankers, payable to "Smith & Co., or order." Kingsford having, as has been already stated, no authority to indorse cheques, indorsed this cheque, not indeed with the name of the firm simpliciter, but in the following form:—"Smith & Co., per S. Kingsford, agent." The defendants' bankers paid the cheque so indorsed on presentment, and the money was received by Kingsford. Kingsford having failed to account to his employers for a sum of 262*l.* out of the moneys received by him on their account, the plaintiffs claimed payment of this as part of the proceeds of this cheque, on the ground that Kingsford having no authority to indorse the cheque, they were not bound by the un-

(1) 6 C. B. 766.

authorized payment of it to him by the bankers. This demand being resisted by the defendants, the present action was brought to recover so much of the proceeds of the cheque as had not been accounted for by Kingsford, or, at all events, to recover the cheque itself as still remaining their property, in order that they might duly indorse it, and present it to the bankers for payment. The Lord Chief Justice of the Common Pleas having, on these facts, nonsuited the plaintiffs on the trial at Nisi Prius, a rule nisi for a new trial, on the ground of misdirection, was granted, but that rule was, after argument, discharged by the Divisional Court of Common Pleas, and the question is, whether the order discharging it was right.

The first question which presents itself (its bearing on the case will be seen further on) is whether, as between themselves and their customers, the defendants in the action and the respondents here, the bankers were justified in paying the cheque. By 16 & 17 Vict. c. 59, s. 19, "Any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof."

It is under this enactment that the payment of this cheque by the defendants' bankers is said to have been warranted, and the contention on the part of the defendants is that, the cheque having been taken in payment, and paid by the defendants' bankers on presentment, under circumstances which made it under the statute a good payment against them, there has been no default on their part, so as to render them liable to make good the loss to the plaintiffs, or to restore the cheque, which as soon as it was paid became theirs, and which they are therefore entitled to retain. But it is said on the other side that the present case is not within the foregoing enactment, because the indorsement does not purport to be that of the persons to whom the cheque is made payable,

1877

CHARLES v. BLACKWELL.

but that of the payees, "by S. Kingsford, agent." In dealing with this objection, let us first see what before the statute would have been the position of the parties, with reference to a cheque on demand made payable to order and therefore requiring indorsement. The only reason why cheques were not so drawn before the passing of 16 & 17 Vict. c. 59 was that they required the same stamp as a bill of exchange of the like amount. With the necessary stamp such a cheque would have been perfectly valid. And first let us consider it with reference to an agent indorsing by procuration, having authority so to indorse. A cheque on a banker being for the most part, in effect, an inland bill of exchange, and there being nothing in point of law to prevent a cheque from being drawn to order, as well as a bill of exchange, whatever indorsement would have been a sufficient indorsement of a bill of exchange made payable to order would have been a sufficient indorsement of such a cheque. Therefore, inasmuch as a bill of exchange payable to a given person might be indorsed by procuration by an agent having authority to indorse, if an agent having such authority had indorsed such a cheque on behalf of the payees, there can be no doubt that the payment of the cheque by the banker would have been a good payment as between him and his customer, the drawer, and a good payment likewise as between the drawer and the payees, though the agent should have embezzled the proceeds of the cheque.

Now the purpose of the enactment we are dealing with was, when cheques payable to order were expected to become general, to protect bankers against the possibility of forged indorsements. The only reason why cheques had not been drawn payable to order before being, as I have stated, the expense of the stamp, when the Stamp Act of 16 & 17 Vict. included these cheques among those which should be subject to the penny stamp, it was of course foreseen that the great convenience arising from the use of such cheques would make them of constant recurrence. It was equally certain that the use of cheques drawn to order would expose bankers to serious danger from forged indorsements, payment upon which, as the law then stood, would have been to their own loss. It was against this danger that the 19th section of the Act was intended to protect them. Against forgery of the writing of

his own customers the banker must be assumed to be capable of protecting himself. He is, or ought to make himself acquainted with the signatures of his own customers. He cannot be acquainted with the signatures of the multitude of payees or agents who may have to indorse cheques drawn upon him, and made payable to order. It was not unreasonable, therefore, that while the customer obtained the advantage of being able to draw cheques payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk. By making a cheque payable to order, the drawer obtained the advantage that if the cheque is stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons, who would not scruple to present a cheque payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run. Furthermore, he obtains through the indorsement of the payee an acknowledgment of the receipt of the cheque and of its payment. Obtaining this benefit, it was but reasonable that the possibility of a forged indorsement should be at his risk, or at all events be a question between him and the payee, leaving the banker free from liability. But the danger to which the banker is thus exposed, from his ignorance of the handwriting of the indorsement, exists as much where the indorsement purports to be by an agent, as where it purports to be that of a payee. The form of indorsement by procuration, though not so common as the immediate indorsement of the payee, is yet sufficiently so to expose the banker to danger from spurious indorsements in this form, and we cannot doubt that it was the intention of the legislature to protect him from the liability he could not guard against, whatever the form which the indorsement might assume. The enactment must have been intended to apply to both forms of indorsement—to that purporting to be by procuration, as well as to that purporting to be the indorsement of the payee.

The payment being thus good as between the banker and his customer, the drawer, we have next to consider what under these circumstances is the position of the payee. Of course, before the cheque has reached him no such question can arise. If it is abstracted from a letter, or is lost by a clerk or messenger while on its way to the payee, and a forged indorsement is put on it by

1877

CHARLES v. BLACKWELL.

some one into whose hands it has fallen, and the cheque is paid, the loss must fall on the drawer. It is as though the debtor had sent so much cash by an agent or messenger, and the money had been lost or stolen on the way, and had never reached the creditor's hands.

But suppose the cheque to have been delivered in payment to the payee, or to his authorized agent. The cheque then operates as payment, and extinguishes the debt, subject only to the condition that, if upon due presentment the cheque is not paid, the original debt revives. But if the cheque is stolen or lost by the payee, and, on its presentment by a party into whose hands it has fallen, is paid before the payee has had time to give notice of the loss to the banker, or while he delays giving such notice, the loss must fall on him. He has taken the cheque in payment, and cannot call upon his debtor for a second payment so long as the latter is in no default as regards payment of the cheque on presentation. Such is the practical effect of the decisions in the cases of *Hansard* v. *Robinson* (1) and *Crowe* v. *Clay* (2) with reference to cheques payable to bearer, as, practically, all cheques were payable before 16 & 17 Vict. c. 59. And the matter is equally clear on principle; for where the banker paid the bearer of such a cheque, he obeyed the mandate of his customer, the drawer, and could charge him accordingly; while, on the other hand, the customer was protected, and this even though the bearer so paid had no property in the cheque, but was himself a thief who had stolen it. The drawer was entitled to say to the payee: "I gave you an instrument which you were willing to take in satisfaction of your debt if the drawee paid its amount to the bearer, and this the drawee has done."

The present, however, is not a cheque payable to bearer, but to order; but can there be any difference in this respect between a cheque payable to bearer and one payable to order? Did not the statute mean that the same result should, and does it not, follow in a case like the present? The plaintiffs were content to take in satisfaction of their debt an instrument drawn on a banker, provided the banker paid it to their order, or what purported to be their order. Let us try it in this way. The action included a

(1) 7 B. & C. 90. (2) 9 Ex. 604; 23 L. J. (Ex.) 150.

claim for the conversion or detention of the cheque. Suppose the defendant had delivered it back to the plaintiffs, what could the latter have done? They could maintain no action on the cheque, or for the goods in payment of which it was given, unless they presented the cheque, and it was dishonoured, and notice thereof given. But on refusing to pay it a second time, the bankers would not dishonour it. They would indeed refuse to pay it, but only because they had paid it already. If the plaintiff should say, "Yes, but to one who had no title to the cheque," the answer would be that it had been paid to one to whom the banker was authorized to pay it by operation of the statute. A cheque payable to order, when taken in payment, operates, like a cheque payable to bearer, as payment till such time as default is made by the drawee on presentment of the cheque. Unless, therefore, the payees are in a position to shew such default, how can they maintain an action in respect of the original debt?

Thus far we have been considering the 19th section with reference to a case in which, an agent having authority to indorse by procuration, the indorsement of the agent has been forged. But in the present instance we have to deal with a case in which the handwriting of the indorsement is not forged or spurious, but genuine. It is what it purports to be, an indorsement in the name of the payees by an agent; but the agent, though he had authority for other purposes, had no authority to indorse. Is the 19th section applicable to such a case? The enactment was intended to relieve the banker from liability, when paying on indorsements the genuineness of which he had no means of testing; but was it intended to relieve him from the ordinary duty of looking to see, before he pays a cheque made payable to order, that the indorsement is that of the proper indorser, as he would have had to do in the case of a bill of exchange accepted by his customer? If it was incumbent on him to do so, it may be said that the form of this indorsement, purporting to be that of an agent, would have made it incumbent on him to ascertain, before he paid the cheque, that the agent had authority to indorse; the effect of an indorsement by procuration being, according to the authority of the cases of *Alexander* v. *Mackenzie* (1) and *Stagg* v. *Elliott* (2), to give

(1) 6 C. B. 766. (2) 12 C. B. (N.S.) 373; 31 L. J. (Ex.) 260.

1877

CHARLES v. BLACKWELL.

notice to whoever takes a bill (and the same principle must apply to a cheque), that the agent has only a limited authority, so as to put an indorsee to the necessity of ascertaining that the agent had authority before he took the bill. It is true those were cases in which the indorsee sought to hold an acceptor or indorser liable, but the reasoning would equally apply where the drawee is paying on an acceptance, or a cheque on which, if payment is made to a party not entitled as the proper transferee of the bill or cheque, the acceptor of the former or the drawer of the latter may still remain liable. On the other hand, it may be said that, though an individual or a company, taking a negotiable instrument by indorsement, may well be expected to ascertain the authority of the agent before they consent to take such an instrument on his indorsement, it would be a most serious hindrance to the dispatch so essential in banking business, and would create so serious an impediment to the negotiability of cheques drawn to order, if a banker, paying on such an indorsement, were not to be protected, and were obliged in every instance first to satisfy himself of the agent's authority, that it may reasonably be assumed that the statutory immunity given to bankers was intended to include such a case. A confirmation of this view may be found in the second branch of the 19th section, which provides that it shall not be incumbent on any such banker to prove that such indorsement or any subsequent indorsement was made by, or under the direction or authority of, the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof. The purpose seems to have been to make the banker free of all responsibility in respect either of the genuineness or validity of the indorsement, whether purporting to be that of the payee or subsequent indorser on the one hand, or of an authorized agent on the other.

If this be the effect of the section, the reasoning just now applied to the indorsement of an agent having authority to indorse applies also here. The cheque has been given and taken in payment. It has been paid. A portion of the proceeds has been lost to the payees, but by no default of the drawers. The cheque was paid on presentment, under circumstances which made the payment by the bankers lawful. The wrongful act, by which

the loss to the appellants has been brought about, was the act of their own servant. The act was done by that servant not in fraud of the drawers or their bankers, but in fraud of his principals. Upon what principle, then, if the position holds good that a cheque operates as payment if paid on presentment, can it be said, after the payment of this cheque without knowledge on the part of the drawers or their drawees, that the party indorsing and presenting it was not entitled to the proceeds, that the respondents, the drawers, are bound to pay the amount a second time?

If this reasoning were not satisfactory to our minds, we should be of opinion that this case should go to a new trial, as, in one view of it, which was not submitted to the jury on the trial (a circumstance, we think, to be regretted), the payment to Kingsford was a valid payment independently of the statute. It appears to us that there was evidence, which might well have been submitted to the jury, not only that the appellants had so held out Kingsford as their general agent, as to justify persons dealing with them through him in treating him as such, but also to establish the position, notwithstanding the denial of the principals, that he was possessed of plenary authority to the extent of indorsing cheques payable to the order of Smith & Co. The business in Jewin Street was carried on exclusively by Kingsford, whose name was printed on the invoices as carrying on the business there for Smith & Co. He conducted the business, not as a manager or foreman acting under the superintendence and direction of his principals, but apparently as authorized to do whatever was necessary in the business. Smith & Co., the principals, were not known in Jewin Street, nor was there any other place where they carried on business or could be found in that name. The respondents, in their dealings with Kingsford, do not appear ever to have been brought into contact with his principals. Ostensibly, the business was entirely in his hands. It is admitted that Kingsford was authorized to receive payments in cash, and also by cheques, which, we presume, if payable to bearer, he would get cashed at the bankers' and would carry into account with his principals. Had this payment been made in cash or by a cheque payable to bearer, it would, as I gather from the evidence, have been within the competency of Kingsford to accept payment in either form,

1877

CHARLES v. BLACKWELL.

and to give a valid receipt. I very much question whether, if Kingsford had accounted to his principals for the whole of the proceeds of this cheque, any exception would have been taken by them to his proceeding in indorsing it. Upon this state of facts, if the question had been left to the jury, they would have been well warranted, I think, in finding possibly that Kingsford had implied authority to indorse, though none may have been given him expressly; at all events, that he was held out to the world as an agent invested with plenary authority, so that a cheque payable to the order of his principals might well be paid on his indorsement as their agent. Such a finding by the jury, had the trial not been cut short by the summary process of a nonsuit, might have prevented all subsequent litigation. (1)

Moreover, as far as I can make out, the proceeds of this very cheque may have found their way to the appellants. There is nothing, as I read the evidence, to shew that Kingsford actually misappropriated any of the money received upon the cheque. The cheque, as it is exhibited among the documents, appears to have been crossed to the London and County Bank, Aldersgate Street —we presume the appellants' bankers. All that appears from the statement of the plaintiff Charles is, that a sum of 262*l.* odd remains due to Smith & Co. from Kingsford on the account. It does not follow that the deficiency is of part of the money received on this cheque.

But though we should have thought it better that the question of Kingsford's authority should have been submitted to the jury, yet being of opinion that the nonsuit may be upheld in point of law, we do not think it necessary that the case should go to a new trial.

The question whether the plaintiffs could maintain trover for the cheque is neither more nor less than the question we have been before considering under another form, and has, in fact, incidentally to that question, been already disposed of. A cheque taken in payment remains the property of the payee only so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account with his customer is settled. After

(1) The defendants at the trial admitted that Kingsford had no authority to indorse: see p. 152.

1877

CHARLES v. BLACKWELL.

that, the drawer is entitled to it as a voucher between him and the payee. If the cheque was duly paid, so as to deprive the payees of a right of action, either on it or in respect of the goods in payment for which it was given, they no longer have any property in it.

For these reasons we are of opinion that the judgment of the Divisional Court should be upheld and this appeal dismissed.

*Judgment affirmed.*

Solicitor for plaintiffs: *C. Sawbridge.*
Solicitors for defendants: *Allen & Son.*

---

[IN THE COURT OF APPEAL.]

*Feb.* 6.

KEITH AND ANOTHER *v.* BURROWS AND ANOTHER.

*Amount of Freight—Mortgagee of Ship—Cargo—Lien.*

On the 1st of December, 1874, M., the owner of a ship, then at San Francisco, mortgaged it to the plaintiffs for 7500*l.* and further advances. On the 2nd of December, the captain procured a cargo of wheat "on account of the ship," which cargo was consigned to the order of the shippers under bills of lading stating the freight payable on delivery to be 1*s.* per ton, and the shippers drew bills on M. for the price at sixty days sight, which were attached to the bills of lading, and were accepted by M. The ordinary freight at this time was 55*s.* per ton. In pursuance of previous arrangements, the defendants advanced to M., on the 4th of January, 1875, 3000*l.*, and on the 22nd of February a further sum of 9000*l.*, on the security of the cargo, to meet the bills of exchange, it being arranged that they should sell the cargo and receive the proceeds on M.'s account. On the 19th of February the defendants and M. sold the cargo to J. & Co. for 43*s.* 6*d.* a quarter, the contract stating, "as cargo is coming on ship's account freight is to be computed at 55*s.* per ton." The bills of exchange were met by M. with the money advanced by the defendants, and on the 26th of February M. handed to them the bills of lading (indorsed by the shippers), and assigned to them the freight as at 55*s.* per ton. When the ship arrived, the plaintiffs too possession of her, and claimed payment of freight at 55*s.* per ton:—

*Held*, that as the property in the goods remained in the shippers, the contract for 1*s.* freight was valid; but that there was no contract for freight at 55*s.*, and that the 55*s.*, though called freight, was, in fact, part of the purchase-money; and, therefore (reversing the judgment of the Common Pleas Division), that the plaintiffs, as mortgagees of the ship, were entitled to 1*s.* freight only, and not to 55*s.* Affirmed by H. of L. 2 App. Cas. 636.

THE question argued before the Court of Appeal in this case was, whether the plaintiffs, as mortgagees of a ship, were entitled

1877

KEITH v. BURROWS.

as against the defendants, the owners of the cargo, to freight at 1*s.* or at 55*s.* a ton. There was another question as to the effect of an unregistered mortgage, which it became unnecessary to argue before the Court of Appeal.

The facts of the case are stated at length in the report in the Court below (1), and are sufficiently given in the headnote.

The Common Pleas Division gave judgment for the plaintiffs on both questions, holding the plaintiffs entitled to the 55*s.* freight.

The defendants appealed.

Feb. 5, 6. *Webster* (with him *Thesiger, Q.C.*), for the defendants. This money is not freight, as the goods carried belonged to the owners of the ship. A mortgagee is not the owner until he takes possession: 17 & 18 Vict. c. 104, s. 70. *Brown* v. *Tanner* (2) does not affect this case. The contract of sale is not a contract to carry goods, and creates no freight. The 55*s.*, though called freight, is merely part of the price of the cargo: *Howard* v. *Tucker*. (3) In *Gumm* v. *Tyrie* (4) the goods were not the property of the ship-owner. The real contract for freight was at 1*s.* a ton, and it could not be altered.

*Herschell, Q.C.*, and *C. S. C. Bowen*, for the plaintiffs. A ship, though carrying goods for her owner, is earning freight which belongs to the mortgagee. As between the mortgagor's assignees and the mortgagees, the assignees could not have claimed this cargo and have refused to pay the proper freight. Why should there not be an implied contract to pay 55*s.*, which was the regular freight? The master cannot by giving bills of lading in this shape affect the rights of the mortgagees. The reason why a nominal freight was charged was that the master could not tell what ought to be the freight, and so left it to be fixed by his owner, who has fixed it at 55*s.* The purchasers knew that freight was due, and made their contract in that shape, as did the defendants. If the ship completed her voyage, 55*s.* freight would be due, and the mortgagees must have it. All parties called it freight, and it is freight, and belonged to the mortgagees when they had enforced

(1) 1 C. P. D. 722.
(2) Law Rep. 3 Ch. 597.
(3) 1 B. & Ad. 712.
(4) 4 B. & S. 680; 6 B. & S. 298; 33 L. J. (Q.B.) 97; 34 L. J. (Q.B.) 124.

their claim by taking possession of the ship and cargo: *Liverpool Marine Credit Company* v. *Wilson.* (1) Such freight can be earned: *Flint* v. *Flemyng* (2); *Weguelin* v. *Cellier.* (3)

*Webster*, in reply, cited *Devaux* v. *J'Anson* (4) as to the meaning of the word "freight."

MELLISH, L.J. As we have not heard the argument on the second point in this case, we are bound to assume that the plaintiffs have all the rights of a mortgagee of a ship who has taken possession of the ship; and amongst those rights is, as is well settled, a right to all the freight which he finds accruing at the time when he takes possession; and if he finds any cargo on board in respect of which the freight has accrued, and on which the mortgagor has a lien for the freight, the mortgagee succeeds to that lien, and can enforce it in a court of law. The question to be determined in this case is whether there was any accruing freight to which the mortgagee was so entitled. It was argued by Mr. Herschell, as the foundation of his case, that the mortgagee had a greater right, and that if the mortgagor had carried a cargo on his own account, which cargo the mortgagee found on board when he took possession, he would be entitled to a lien on it for freight as against the mortgagor, although it is obvious that in that case there would be no contract for freight. Now I am clearly of opinion that the mortgagee has no such right. The mortgagee does not become the owner of the ship until he takes possession. There is a clause in the Merchant Shipping Act (17 & 18 Vict. c. 104, s. 70) to that effect. Mr. Herschell seemed to argue that he ought to have that right; as if the goods had, in fact, been carried in the mortgagee's ship. But even if the mortgage in this case had been made before the voyage commenced, the rights of the mortgagees to the accruing freight would be exactly the same, and it would make no difference whether the mortgage happened to have been created prior to the commencement of the voyage or the very day before they took possession of the ship. Therefore it is not true that the goods have been carried in the mortgagees' ship, for the ship was the mortgagor's

(1) Law Rep. 7 Ch. 507.
(2) 1 B. & Ad. 45.
(3) Law Rep. 6 H. L. 286.
(4) 5 Bing. N. C. 519.

1877

KEITH v. BURROWS.

ship until the mortgagees took possession. The purchaser takes the right to all accruing freight from the time of assignment, the mortgagee only from the time of his taking possession. Now if the owner, whilst carrying goods in his own ship, were to sell the ship, it cannot be contended that there would be any freight to be paid to the purchaser in respect of a voyage that had been then already performed. Therefore I am clear that the mortgagees have no right to what they contend is accruing freight, unless they can find in existence at the time when they take possession a contract by which freight was to be paid to the mortgagor.

2 App Cas 643.

Now in this case, although the goods were shipped on account of the owner of the ship, yet Parrott & Co. did not part with the property in them, because they were to be paid for by bills drawn by the master on London, and Parrott & Co. took a bill of lading making the goods deliverable to their own order. Therefore the property did not pass to Morison, the ship-owner, until the bills of exchange were paid, and in the meantime there was a good contract to carry as between Parrott & Co. and Morison at 1*s.* per ton. And it is obvious why the 1*s.* freight was charged: If the ordinary freight had been charged and the price of wheat had fallen, Parrott & Co. might be losers, whereas by charging a nominal freight they could be losers only if wheat fell so much as to be cheaper in England than in California. It was admitted that this contract was perfectly valid, and that the security of Parrott & Co. could not be interfered with by the mortgagees, and that if the bills were dishonoured Parrott & Co. would have had the goods on payment of the 1*s.* freight. Then whilst the goods were on the voyage Morison had to provide for the bills, and he entered into the contract with the defendants, the substance of which was that in consideration of the defendants advancing the money they were to receive the security of Parrott & Co. No doubt it was perfectly competent for Morison to make that contract, and to put the persons who advanced the money in the same position as Parrott & Co. were, namely, that they should have a security upon the entire price of the goods, subject only to the nominal freight. But then we find that the defendants advanced a further sum upon the same security; and the whole case for the plaintiffs depends upon the contention that by the blundering mode in which the parties carried out that con-

tract the defendants failed in getting the full security, and without the smallest necessity have enabled the mortgagees to say that this large sum called freight belongs to them. Now, whether the defendants are to suffer for that blunder depends entirely upon the construction to be put on the contract of the 19th of February, 1875. It was part of the arrangement that the defendants were to sell the goods, and to appropriate part of the money to the payment of the bills, and accordingly the defendants sold the goods in the ordinary way. [The Lord Justice read the material parts of the contract set out in par. 16 of the case. (1)] If the contract had stopped short of the last clause, it would be an ordinary contract for the sale of goods, freight, and insurance, and the only freight to be paid would have been the nominal freight. Of course in the ordinary case the price is all purchase-money as between the vendor and the purchaser, though a part of the purchase-money has to be applied in payment of the freight which would be due to the ship-owner. But as the purchaser would expect to pay the freight only on the ship's arrival, and on the delivery of the goods, this last clause, on which the whole case turns, has been inserted: "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton," the object being that the purchaser might have the advantage of keeping back a sum equal in amount to the freight until the arrival of the ship. No doubt the parties call it "freight," because that is the only word by which it could properly be described, but the question is, whether it is really freight. In my opinion, nothing is freight unless there is involved in it a contract to carry; for freight is a sum payable in respect of a contract to carry, and if there is no contract to carry, then, although the sum to be paid may be called freight, it is not in point of law freight within the rule that the mortgagee is entitled to the accruing freight.

Mr. Herschell argued with great ingenuity and ability that there was a contract for freight, and for this reason: He said, the goods are shipped on the ship-owner's account, and there is, therefore, so far, no contract for carriage; but whilst the goods are at sea, if the shipowner chooses to sell, there is nothing to prevent him from selling the goods and from charging for the freight. But that

(1) 1 C. P. D. at p. 725.

1877

KEITH v. BURROWS.

argument seems altogether to overlook the fact that it is quite incorrect to say that in this case there was no previous contract of carriage. There was a perfectly good contract of carriage contained in the bill of lading, and, as I have already observed, it was not a mere sham, as if the goods had been really the ship-owner's own goods at the time when they were shipped. A bill of lading is, under those circumstances, often executed, but it is a sham, and not evidence of any real contract; or, if it did operate as a contract, it would be only by way of estoppel. That was not the case here. There was a perfectly good contract of carriage, and the goods were not to be delivered until the bills of exchange had been paid; and if it had become necessary for Parrott & Co. to bring an action on account of the goods having been damaged, they could no doubt have done so. Why should there be a second contract of carriage, one assignable as being contained in the bill of lading, the other not assignable as not being contained in the bill of lading or in a negotiable instrument? I am of opinion that the Court must look at what the 55*s.* really is, and it really is purchase-money. The effect of the contract is simply this, that of the purchase-money the 43*s.* 6*d.* per quarter is to be paid at once, and the residue, namely, what is called freight at 55*s.* on the arrival of the ship. That was the only object they had to effect, and in my opinion the mere fact that they called the 55*s.* freight ought not to prevent the carrying out their contract, particularly as the effect of not construing it in that way would be that we should deprive the defendants of the perfectly good security which Morison was perfectly entitled to give them. That being the true construction of the contract, Morison, for the purpose of securing the defendants, makes the further assignment of the 24th of February, 1875, again no doubt calling the 55*s.* freight; but that cannot alter its real nature—it was still part of the purchase-money, and not anything else. The defendants had sold the goods, and that part of the money which they were to receive at once was to be applied towards taking up the bills; and to secure the repayment of further sums advanced they were to receive the rest of the purchase-money. This further appears from the fact that the assignment authorizes them to receive from the purchasers this sum which they call freight. I am, therefore, of opinion that, though there

1877

KEITH v. BURROWS.

was a cargo on board, and though Morison had a lien on that cargo for the sum to be paid on the delivery of the cargo, he had that lien, not as ship-owner for freight, but as vendor for unpaid purchase-money. I am of opinion that, except the nominal freight, there was no accruing freight, and that the Court is not bound to construe this as being a contract for freight for the purpose of giving the mortgagees of the ship a better security to the prejudice of the defendants, who have bonâ fide advanced their money, with notice of all the circumstances in the contract, on security which appeared to be, and in my opinion was, a perfectly good security.

BAGGALLAY, J.A. I am entirely of the same opinion as that expressed by the Lord Justice Mellish, and for the same reasons; and I have nothing to add to what he has said.

BRAMWELL, J.A. I am entirely of the same opinion, and the Lord Justice has so entirely expressed the view I take of the case, that if this were a small amount, or a case which was now heard for the first time, I should say nothing, because I do not think I can add to the reasoning that has been given. But considering that this case is upon appeal, and possibly may go further, and considering the largeness of the amount involved, I think it is desirable to say in my own language why I entertain the opinion that I do entertain. A purchaser or a mortgagee taking possession of a ship before the voyage is ended, and finding goods on board which have been carried on the terms that freight should be paid, and on which there is a lien, is entitled to that freight, and the plaintiffs here were so entitled. The question is whether they were entitled to 1*s.* or 55*s.* In my judgment they were entitled to 1*s.* only. Mr. Herschell says they were entitled to 55*s.*, because there had been an agreement to pay that sum as freight. But freight supposes a contract and two persons parties to it, the one who is to carry the goods, and the other who is to pay freight for them. Is that the case here? Mr. Herschell says it is, and that there has been a contract of carriage entered into between these two parties, Morison, the ship-owner, and Jump & Sons, the buyers of the goods, and he says that the contract was this: "Whereas my ship and the cargo on board are now in mid ocean, I will under-

1877

KEITH v. BURROWS.

take to carry the goods from wherever they are in that ship, and deliver them to you, Jump & Sons, at a freight of 55*s.*, putting myself in the situation of a carrier, and you in the situation of the freighter, the voyage commencing wherever the ship may be at the time when the contract of sale is entered into." That is a very ingenious argument, but in reality it is wholly unfounded, and it results from looking at a word instead of looking at the substance of the thing. There is no pretence for saying that in reality there was a contract for carriage between these two parties, so that the buyer would be entitled to say, "I gave you 55*s.* a ton freight, and you have not performed your contract of carriage because, by the fault of the captain or the sailors, my goods have been damaged." There was no such intention in their minds, but they have used the word "freight" for a reason which is obvious: When a person buys a floating cargo, as a rule, if it is not the cargo of the ship-owner, he does not pay the freight unless the cargo arrives, nor until the cargo arrives; therefore Jump & Sons, when they were purchasing—like any one else who was purchasing in the market—a floating cargo, desired to purchase it upon the same terms as if Morison had not been the ship-owner, but had been the shipper of the cargo, or a person interested in the cargo, or it had been shipped upon his account from abroad. That is the reason why this term is used. Suppose that instead of putting in the word "freight" they had put in "a sum to be in the nature of freight," or some such expression as that, meaning a sum not to be payable unless the ship arrives, and only when the ship does arrive, and that it should be taken at 55*s.*, what would have been the result? The word "freight," which has given rise to this controversy, would not have applied; but here they used the word as is commonly done by people who do not foresee the mischievous consequences which may arise from want of precision in their expressions.

The truth is that this is a contract for the sale of goods. If, as the Lord Justice says, Jump & Sons had re-sold the cargo (which they did), the same expression would have been used, and yet could it be pretended that the purchaser of the cargo intended to enter into any contract of freightment or for paying freight as such? And what difference is there that in this case the purchase is from Morison, and why should we put a different interpretation

upon this contract to that which we should put upon any other for the purchase of goods from a shipper who was not a ship-owner? Let us test it in this way. Supposing an action had to be brought by Morison against the defendants, would it be for goods sold and delivered, or for freight? It would be clearly an action for goods sold and delivered. Any lien that Morison would have had in this case would, in my opinion, have been a lien for freight to the extent of 1*s.* only, and as to the rest a lien as an unpaid vendor. And it should be remembered, in considering this case as to the interpretation to be put upon this contract (to which, be it observed, the plaintiffs were not parties), that the defendants' title had already accrued. The sale was on the 19th of February, and the bills were not paid until the 22nd of February; but the agreement between Morison and the defendants, under which their title accrued, was made at some time in December or in the beginning of January. [The learned judge read the 11th and 13th paragraphs of the case.] So that the defendants' title accrued certainly as early as the 4th of January, and at that time they of course would have been entitled to say to Morison, "You shall not sell upon any terms to make a larger sum than 1*s.* payable for freight." Otherwise they would have lost their full security. If that be so, the suggestion is, that the defendants nevertheless (I will not say with their eyes open, but through forgetfulness or in some way) have flung away security to the extent of upwards of 3000*l.* I am of opinion that that is not so, that there was no contract of freight here except for the 1*s.*, and that the plaintiffs had no title to the 55*s.*

And it is a convenient thing that we should hold this to be so, because, although no doubt it may be very useful that people should be encouraged to lend money on the mortgage of ships, yet, if they choose to leave the mortgagors in possession, it is also very desirable that the mortgagors should have the power to deal with the ships in the most advantageous way; and there can be no doubt that occasionally it is very advantageous that ship-owners who cannot get a freight should themselves have a mercantile venture, as in this case. Now Parrott & Co. would not have shipped unless there had been this margin, and the defendants would not have advanced money to take up these bills

1877

KEITH v. BURROWS.

unless they knew there was a safe margin. They knew they would get Californian wheat here freight free, which was a guarantee against any loss unless there was a very extraordinary fall. But suppose these bills had been dishonoured, what freight would then have been payable? Suppose the defendants had not advanced the money to take them up, though the contract for sale had been made? The shippers' freight agent in that case would have been only held liable for 1*s.*: and why should the defendants be held liable for more? Upon these grounds I am of opinion that the judgment should be reversed.

But there is another point to which I should like to call attention. It is respectful to the Court below to say that in their judgment this matter was almost assumed, and, as it seems to me, without adequate reason being given, it was taken as a thing which was clear and certain. (1) Another observation is, that the cases shew that freight cannot be assigned as against the mortgagee of the ship; that is to say, if Morison had been minded to raise money upon his right to the 1s., he could not have done so to the injury of the mortgagees when they took possession, so as to give any one a preference over the mortgagees. But this is not an assignment of freight, and, as I have said already, this is no creation of freight; but, assuming that freight was created, we must take it that it was created by a contract between Morison and Jump & Sons, by which Jump & Sons are to pay freight, not to Morison, but to the defendants. It is, therefore, not the case of assigning freight and giving an equity, but it is a case of making a sort of trilateral bargain, by which the defendants would be entitled to the freight from Jump & Sons.

I am of opinion that there was no contract of carriage except for 1*s.*; and if in any point of view it can be said that there was such a contract, then, at the very time when the freight was brought into existence, it was brought into existence as a thing to be paid, not to the ship-owner, but to the defendants.

*Judgment reversed.*

Solicitors for plaintiffs: *Freshfields & Williams.*
Solicitors for defendants: *Lowless & Co.*

(1) See 1 C. P. D. at p. 730.

MARY ANN HARRIS, ADMINISTRATRIX OF JAMES SULLIVAN, DECEASED, *v.* THE HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN-GESELLSCHAFT, OWNERS OF THE STEAMSHIP FRANCONIA.

1877
*Jan.* 13.

*Practice—Service of Writ upon a Foreigner residing Abroad—Local Limits of the Court's Jurisdiction—Order XI., Rule* 1.

Sect. 527 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to *property*, and does not extend to injury to the *person*.

The ordinary Courts of this country have no jurisdiction over acts done by oreigners on the high seas below low-water mark: consequently, Order XI., Rule 1, of the Rules of 1875, does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within three miles of the English coast.

*Reg.* v. *Keyn* (2 Ex. D. 63) held binding to that effect on all the Courts.

THIS action was brought by the plaintiff as administratrix of James Sullivan, deceased, to recover damages (under Lord Campbell's Act, 9 & 10 Vict. c. 93) sustained by herself and children by reason of the death of the intestate, which was caused by the alleged negligence of the defendants' servants in navigating their steamship *Franconia*, under the following circumstances:—

On the 17th of February, 1876, the *Franconia*, a German vessel, carrying German colours, commanded by a German master, and manned by a German crew, being bound from Hamburg to St. Thomas's, in the West Indies, with cargo, passengers, and mails, being then within three miles of the coast of England, south-south-east of Dover, through the negligence of her commander came into collision with and sank the *Strathclyde*, a British steamship, whereby the deceased and several other persons lost their lives.

The *Franconia* having been arrested at the suit of the owners of the *Strathclyde*, and certain actions being then pending against the owners of the *Franconia* at the suit of other persons, the following order was on the 11th of April, 1876, made in the suit in the Admiralty Court:—

The judge, after hearing and by consent of counsel on both sides, decreed the vessel *Franconia* to be released in this action and in action 1876 D. No. 222, on payment into Court by the defendants of an amount equal to 8*l.* per ton of the

1877

HARRIS v. OWNERS OF FRANCONIA.

gross tonnage of the said vessel, with a sufficient sum to cover interest and costs in both the said actions, and on the defendants giving bail to answer judgment in actions 1876 Q. No. 258 and 1876 C. No. 266, and undertaking through their solicitors either to give bail to answer judgment in any further actions for loss of life or personal injury that may hereafter be instituted by plaintiffs' solicitors against the said vessel, or to pay into Court a further sum of 7*l.* per ton of her gross tonnage, with a sufficient sum to cover interest and costs to answer such further actions,—without prejudice, however, to any objection that the defendants may hereafter raise as to the jurisdiction of this Court in respect to any claim against the said vessel for loss of life and personal injury.

The defendants are a corporation carrying on business at Hamburg, in Germany.

The plaintiff in this action having obtained an order for service of the writ of summons on the defendants at Hamburg, a summons was taken out calling upon the plaintiff to shew cause why that order should not be rescinded, on the ground that the cause of action did not arise within the jurisdiction of the Courts of this country. The summons was referred by the judge to the Court.

*Benjamin, Q.C.* (with whom were *Cohen, Q.C.*, *G. W. Phillimore*, and *Stokes*), for the defendants. The Courts of this country have no jurisdiction in a personal action against a foreigner residing abroad, unless the cause of action arises within the jurisdiction. This is not an action in rem. The real question is whether the point is not determined by the decision of the majority of the judges in *Reg.* v. *Keyn.* (1)

[GROVE, J. Although all the judges of this Court were in the minority on that occasion, of course the decision binds us.]

The ratio decidendi there was that the Central Criminal Court had no jurisdiction to try a foreigner for an offence committed by him on board a foreign ship below low-water mark. In the course of his judgment in that case, Cockburn, C.J., says (2): "The strongest instance of legislation relating to foreign shipping is the provision in this part of the Act (3), which, in s. 527, enacts that, 'whenever any injury has, in any part of the world, been caused to any property belonging to Her Majesty or to any of Her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom or

(1) 2 Ex. D. 63. (2) 2 Ex. D. at p. 218.
(3) Part iv. of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

within three miles of the coast thereof, it shall be lawful to the judge of any Court of record in the United Kingdom, or for the judge of the High Court of Admiralty, or in Scotland the Court of Session or the sheriff of the county within whose jurisdiction such ship may be, upon it being shewn to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs, or other officer named by such judge, requiring him to detain such ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of such injury, or has given security, to be approved by the judge, to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed shall detain such ship accordingly.' In one respect this enactment is independent of the three-mile principle, as it extends the liability to seizure for damage done to British property by a foreign ship in every part of the world. But it is undoubtedly a strong assertion of dominion over foreign ships, and is a striking instance of the adoption of the three-mile principle. It may, however, be doubted whether the enactment would apply to a ship on a foreign voyage. The authority is to 'detain,' not seize, and would therefore seem only applicable to a vessel voluntarily seeking our waters otherwise than for the purpose of passage, and so bringing itself within our jurisdiction." That gives a remedy in rem against the ship for damage to property: the enactment is almost conclusive to shew that what is not expressed is excluded from its operation. You may detain the ship, but you cannot sue the owners. Here, the ship has been detained. The fact of the defendants being a corporation is not relied on, seeing that it was decided by the Court of Queen's Bench in *Scott* v. *Royal Wax Candle Co.* (1) that Order XI., Rule 1, of the Rules of Court, 1875, which provides for service of a writ of summons out of the jurisdiction, applies to an action against a foreign corporation resident out of the jurisdiction,—a decision by which this Court will no doubt hold itself bound.

(1) 1 Q. B. D. 404.

1877

HARRIS v. OWNERS OF FRANCONIA.

[LORD COLERIDGE, C.J. The main ground of my judgment in *Reg.* v. *Keyn* (1) was, that it was Admiralty jurisdiction, and Admiralty jurisdiction only. It really comes to the effect of this single section.

DENMAN, J. Sect. 527 of the Merchant Shipping Act, 1854, is consistent with the legislature supposing that an action would lie. The ship is to be detained "to abide the event of *any* action, suit, or other legal proceeding that may be instituted in respect of *such* injury,"—that is, injury to property. If this had been an action for injury to the ship, you would probably not have denied the right to detain the ship?]

No, because the owner in that case comes into Court and submits to the jurisdiction, in order to obtain the release of the ship. No jurisdiction is given in personam, unless the persona is within the limits of the jurisdiction. The ship was released on payment into Court of a sum equal to 8*l.* per ton on her gross registered tonnage: consequently, the ship and her owners are now beyond the reach of English process. The 24 Vict. c. 10, s. 7, enacts "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship:" in *Smith* v. *Brown* (2), it was held by Cockburn, C.J., and Hannen, J. (Blackburn, J., doubting), that personal injury occasioned by the collision of two vessels does not come under the term "damage" as used in the above section; and that the Court of Admiralty has no jurisdiction to entertain a suit instituted under Lord Campbell's Act for personal injuries resulting in death occasioned by the collision of two vessels. Within what jurisdiction, then, was the alleged wrong done here? Not within that of the common-law Courts of this country, for, not one of the judges who took part in *Reg* v. *Keyn* (3) doubted that the Courts of common law have no natural or inherent jurisdiction below low-water mark; and not within the Admiralty jurisdiction, because the Admiralty Court never had jurisdiction in a case of this sort. Order XI., Rule 1, therefore, gives no power to serve the writ of summons in this case at Hamburg. [*Scott* v. *Lord Seymour* (4) was also referred to.]

*Clarkson* (*Butt, Q.C.*, and *R. E. Webster*, with him), for the

(1) 2 Ex. D. 63, 151.
(2) Law Rep. 6 Q. B. 729.
(3) 2 Ex. D. 63.
(4) 1 H. & C. 219; 32 L. J. (Ex.) 61.

S. Jur. N.S. 560

plaintiff. Jurisdiction in the order means territorial jurisdiction, i.e. the jurisdiction of the Queen as Queen of England. The collision which resulted in the death of the intestate having taken place within three miles of the coast of England, the act done was within the limit of that jurisdiction. The existence of this territorial jurisdiction is the very foundation of s. 527 of the Merchant Shipping Act, 1854. The wrong complained of having been done within Her Majesty's dominion for any purpose, there can be no reason why the order for the service of the process upon the persons who did it should not be made out of the territory.

[LORD COLERIDGE, C.J. The majority of the judges in *Reg.* v. *Keyn* (1) were of opinion that the territory of England stopped at low-water mark; and the legislature has nowhere for this purpose extended it beyond that.]

LORD COLERIDGE, C.J. This is a motion to set aside an order for the service of a writ upon the defendants, a foreign corporation, at Hamburg. I am of opinion that the order must be set aside. It seems to me to be quite plain that the decision in *Reg.* v. *Keyn* (1) is binding upon all the Courts. The ratio decidendi of that judgment is, that, for the purpose of jurisdiction (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark. The matter in respect of which this action is brought, therefore, happened beyond the jurisdiction of the Queen's Courts; and therefore I think Order XI., Rule 1, does not enable a judge to order service of the writ out of the jurisdiction. I think further that s. 527 of the Merchant Shipping Act, 1854, has no application here. That section gives a special remedy under special circumstances, and those circumstances are absent in this case.

GROVE, J. I am of the same opinion. The real question is whether this case is within s. 527 of the Merchant Shipping Act, 1854, or within Order XI., rule 1, of the Rules of 1875. Now, the words of the section are very clear. They give power to certain persons, where injury has in any part of the world been caused by

(1) 2 Ex. D. 63.

1877

HARRIS v. OWNERS OF FRANCONIA.

a foreign ship to any property belonging to any of the Queen's subjects, to detain the ship if found in any port or river of the United Kingdom, upon its being shewn that the injury was probably caused by the misconduct or want of skill of the master or mariners, until the owner makes satisfaction or gives security to abide the event of an action in respect of such injury. It is enough to say that this is not an action brought in respect of an injury to property by the ship in question; and that alone appears to me to put this case out of that enactment. We cannot extend the remedy beyond what the statute gives. As to Order XI., Rule 1, that does not alter or extend the jurisdiction of the Courts, but only gives them power to allow service of process abroad in respect of a cause of action arising in this country. That leaves the jurisdiction of the Courts of law, whether High Court or Court of Admiralty, just as it was before. We are clearly bound by the decision of the majority in *Reg.* v. *Keyn.* (1)

DENMAN, J. I am of the same opinion. My only reason for referring the matter to the Court was, that the point was an important one, not that I entertained any doubt as to what the decision ought to be. I think Mr. Clarkson failed to point out any such distinction between a case of manslaughter and that of a civil action as would enable us to say that the decision of the majority of the Court in *Reg.* v. *Keyn* (1) is not a binding authority against him. The only case in which the Courts can exercise the power given to them by Order XI., Rule 1, of the Rules of 1875, is, where the act or thing complained of is done within the jurisdiction. The case of *Reg.* v. *Keyn* (1) clearly goes the length of holding that, for all purposes, apart from any express statutory provision, the moment you get beyond low-water mark you get beyond the jurisdiction within which the Queen's writs run. The order must be rescinded, with costs.

*Order rescinded.*

Solicitors for plaintiff: *Gellatly, Son, & Warton.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

(1) 2 Ex. D. 63.

## RUMSEY *v.* NICHOLL.

1877
*Jan.* 31.

*Exchange of Livings—Effect of Deed of Resignation where the Exchange falls through—Ejectment for the Rectory House and Glebe.*

In 1864 the plaintiff was presented, instituted, and inducted to the rectory and living of L. In 1867 he obtained permission to exchange livings with some clergyman to be approved by the patron, and thereupon entered into negotiations with one P., the incumbent of the living of C. The patron, having satisfied himself of the suitability of P., approved of the proposed exchange of livings, and promised to do all things necessary on his part to carry it out. Relying on this promise, and having obtained the sanction of the bishop to the exchange, the plaintiff executed a deed of resignation of the living of L., and delivered it to the bishop's registrar, who received it with knowledge that it was executed with a view only to the exchange. The patron failing to present P. to the living of L., but claiming an absolute right to dispose of it by reason of the plaintiff's resignation, in violation of his promise presented the defendant thereto, and the defendant, with knowledge of all the premises, accepted the presentation, and "took possession of the rectory house, glebe lands, and *living* of L.," and still remained in possession thereof. In ejectment by the plaintiff to recover possession of "the rectory house and glebe lands:"—

*Held*, by Denman, J., on demurrer to the claim, that the mere fact of the exchange having failed would not entitle the plaintiff to maintain ejectment against the new incumbent, who was in possession of the living (as must be assumed from the statement of claim) by institution and induction; the plaintiff's remedy, if any, being against the patron for the breach of his agreement.

Affirmed in Ex. Ch. post 294 (a)

CLAIM. 1. In the year 1864, the plaintiff was presented, instituted, and inducted to the rectory and living of Llandough, in the county of Glamorgan, and entered into possession of the rectory house, glebe lands, and profits of the said rectory and living, and continued therein until dispossessed as hereinafter mentioned.

2. In or about the month of January, 1867, the plaintiff requested permission from C. R. Mansel Talbot, the patron of the said living of Llandough aforesaid, to exchange livings with some clergyman to be approved by the said patron.

3. The said patron granted the permission requested as aforesaid, and the plaintiff thereupon entered into negotiations with one Robert Pinckney, who was then the incumbent of the living of Chilfrome, in the county of Dorset, and the plaintiff subsequently submitted the name of Pinckney to the patron in terms of the

1877

RUMSEY v. NICHOLL.

arrangement aforesaid. The said patron, after making personal inquiries, and satisfying himself by the said inquiries of the suitability of Pinckney, approved of the proposed exchange of livings, and promised that he would do all things necessary on his part to enable the plaintiff and Pinckney to carry out an exchange of their livings as aforesaid.

4. Relying on the said promise, and for the purpose of carrying out the said exchange, the plaintiff executed a deed of resignation of the living of Llandough, and delivered the same into the hands of the registrar of the Bishop of Llandaff. Before executing and delivering the said deed of resignation, the plaintiff had, with the sanction and to the knowledge of C. R. Mansel Talbot, the patron aforesaid, requested and obtained from the bishop permission to exchange livings with Pinckney; and at the time of executing and delivering the deed, the plaintiff explained fully and explicitly to the registrar aforesaid his intention and the object which he had in view in executing and delivering the said deed, and the registrar on behalf of the bishop aforesaid accepted the said deed to hold for that purpose only. And at the time of executing and delivering the said deed, and before and after such execution and delivery, the said bishop, and the said registrar, and the said patron knew well that the deed was executed and delivered as aforesaid by the plaintiff in reliance on and in consideration of the promise made by the patron in paragraph 3 mentioned, and with full intention on the part of the plaintiff that, if the said exchange as aforesaid should happen not to be carried out, the said deed of resignation was to be held and become null and void to all intents and purposes whatsoever, and the plaintiff should have full liberty to remain in, or, if need were, re-enter on the possession and enjoyment of his living aforesaid.

5. Notwithstanding the premises the said C. R. Mansel Talbot, the patron aforesaid, did not and would not fulfil his part of the agreement in paragraph 3 mentioned, and did not and would not present Pinckney, or do what was necessary on his part to carry out and effectuate the exchange of livings proposed between the plaintiff and Pinckney, but, falsely claiming and pretending to have obtained an absolute legal right to dispose of the plaintiff's said living by the resignation executed and delivered as aforesaid,

and in violation of his promise and agreement aforesaid, and not regarding the plaintiff's remonstrance, claimed right to present, and did upon such false claim present his nephew, the defendant, to the plaintiff's said living of Llandough.

6. The defendant, in full knowledge of all the premises, and despite the remonstrances of the plaintiff, accepted the said presentation, and, pretending right therefrom, broke and entered the rectory house and glebe lands and living of Llandough aforesaid, and expelled the plaintiff from his possession thereof, and took and received to his own use all the issues and profits and the beneficial use and occupation of the said rectory house, glebe lands, and rectory and living of Llandough aforesaid, and has continued ever since to keep the plaintiff ejected as aforesaid; whereby the plaintiff during all that time has lost and been deprived of the beneficial use and occupation of the said rectory house, glebe lands, and rectory, and living, as aforesaid, and of all the issues and profits thereof. And, though the defendant has been repeatedly desired and required to vacate and yield up possession of the rectory house, glebe lands, rectory, and living aforesaid, and the issues and profits thereof, he still continues to keep possession of the said rectory house, glebe lands, rectory, and living aforesaid, and to keep the plaintiff ejected therefrom, and to convert to his own use the issues and profits thereof, to the plaintiff's great loss and injury.

The plaintiff claims,—(1.) possession of the rectory house and glebe lands aforesaid,—(2.) 4000*l.* for mesne profits from November, 1867, until such possession shall be given.

Demurrer, on the ground that the statement of claim shews that the plaintiff is not entitled and that the defendant is. Joinder.

*W. G. Harrison*, in support of the demurrer. The statement of claim shews that, in 1867, the plaintiff resigned the living of Llandough, and the defendant was duly presented thereto, and has ever since remained in occupation and possession of the rectory house, glebe lands, and rectory and living. If there has been any irregularity on the part of the patron, the plaintiff's remedy is against him and not against the new incumbent. The

1877

RUMSEY v. NICHOLL.

temporalities go with the living; and Courts of law cannot deal with them. It is true that it is not alleged in so many words that the defendant was instituted and inducted into the living; but that the fact was so is the necessary result of the whole statement of claim. To entitle the plaintiff to the possession of the rectory house and glebe lands, he must shew that he is possessed of the living. Having resigned or been dispossessed of the living, he can have no right to the temporalities.

*M'Clymont*, contrà. If the statement of claim shews a legal wrong, this is the proper Court in which to seek the remedy, and the defendant, who was a party to the wrong, is the proper person to sue. The reasoning of the judges in *Morris* v. *Ogden* (1) shews that they assume that, if the sentence of deprivation was null and void, the rights of the suspended incumbent would remain unaffected. It is well settled law, that, until an exchange is fully executed by the admission, institution, and induction of both parties, the whole proceeding is void; or, in other words, the execution of a deed of resignation by the one party with a view to an exchange creates no disability in him until the exchange is carried out by the other: see Fitzh. Abr. Exchange, p. 10; *Lord Cromwell's Case* (2); Gibson's Codex, p. 821; Watson's Clergyman's Law, p. 28; *Downes* v. *Craig.* (3) The passage in Watson is as follows:—"Two persons by one instrument in writing do agree to exchange their benefices, and in order thereunto resign them into the hands of the ordinary: such exchange being executed, the resignations are good; but, though the one is instituted and inducted into the other's benefice, yet, if the exchange be not executed on both parts, the clerk on whose part the exchange was not executed may have his benefice again: 45 Edw. 3; Fitzh. Abr. Exchange, p. 20: for, in the case of exchange, the law doth annex this condition to a resignation, if it be fully executed. And so, if two upon such agreement resign as aforesaid, and the patrons according to their agreement present cross de novo (as they must do if the exchange be executed: Mich. 18 & 19 Eliz., *Grendon* v. *Bishop of Lincoln* (4)), and the one is admitted, instituted, and inducted into the other's benefice, and the other is likewise insti-

(1) Law Rep. 4 C. P. 687, 702.
(2) 2 Co. Rep. 74 b.
(3) 9 M. & W. 166.
(4) Plowd. 3 E. 3, c. 18.

tuted into his, but the first dieth before he is inducted into his benefice, although after a mandate made by the bishop to the archdeacon for his induction (although the induction of the first was absolute), yet because it was directed by the precedent agreement, which ought to be executed on both parts in the lifetime of the parties (which in this case it was not for want of induction), the exchange is void: 45 Edw. 3; Fitzh. Abr. Exchange, p. 10; Hill. 43 Eliz. *Lord Cromwell's Case.* (1) The like law, if before the completing of the exchange by mutual presentment, institution, and induction, the reason of the exchange fail; for, respect must be had to the resignation and protestation [presentation?] of both incumbents: and therefore either incumbent may return to his old benefice in pristino statu, upon his former presentments: 45 Edw. 3; Fitzh. Abr. Exchange, p. 10; Register, p. 306 B.; Mich. 20 Jac. *Holt and Glover* v. *Bishop of Coventry and Litchfield.*" (2) And see 2 Burns, Ec. Law, p. 242. At common law, the signing of a deed operates nothing; to make it effectual delivery is necessary. So, in the case of a bill of exchange, indorsement alone will not pass the property, without delivery: *Marston* v. *Allen.* (3) Here, the deed of resignation was in effect handed to the registrar of the bishop as an escrow, and in the manner and for the purpose mentioned in paragraph 4. The plaintiff has no other way of trying his right to the living than by ejectment.

*Harrison*, in reply, referred to 1 Phil. Ec. Law (ed. 1873), p. 504, which substantially gives the law as in Watson, p. 28, and 2 Burns, Ec. Law, 242.

*Cur. adv. vult.*

Jan. 31. DENMAN, J. This was a demurrer to the statement of claim. The plaintiff claimed possession of a certain rectory-house and glebe lands, and 4000*l.* for mesne profits from November, 1867, until possession should be given.

If the statement of claim had merely been confined to allegations that the plaintiff had been duly presented, instituted, and inducted to the rectory and living in question, and that the defendant had broken and entered the rectory-house and glebe lands, and

(1) 2 Co. Rep. 74 b. (2) Hob. 152; Owen, 12.
(3) 8 M. & W. 494.

1877

RUMSEY v. NICHOLL.

expelled the plaintiff from his possession thereof, there can be no doubt that the statement of claim would have been perfectly sufficient, and would have made it incumbent upon the defendant to plead facts shewing his right to the possession of the rectory-house and glebe. That ejectment will lie for a rectory-house and glebe by the person duly instituted and inducted, even as against a tenant under notice to quit at a future time from the last previous incumbent, appears from the case of *Doe* d. *Kirby* v. *Carter* (1): see also *Cook* v. *Elphin.* (2) But the statement of claim in the present case contains allegations which the defendant's counsel contends are sufficient to prove that the plaintiff, upon his own shewing in that statement, is not entitled to maintain ejectment; and on that ground he demurs to the statement of claim.

The statement of claim, in addition to the allegations which would be necessary, and, if unaccompanied by more, sufficient to make out a case in ejectment, contains other allegations so intermixed with them that it is not on the face of the whole statement easy to say what the case of the plaintiff is. But, upon careful perusal of it as a whole, I think it is sufficiently clear that it intends to admit that the defendant is in actual possession, not only of the rectory-house and glebe, but of the living itself, which can only be by presentation, institution, and induction: and it does not, in my opinion, state any facts which, if that be the case, would give him a right to sue the defendant in ejectment.

The statement of claim, after stating the plaintiff's presentation, institution, and induction to the rectory and living, contains four paragraphs, numbered 2 to 5, upon which the plaintiff's counsel relied as amounting to a statement that the plaintiff still remained in possession of the living until the patron, in violation of an agreement of exchange, assented to by himself, the bishop, and the plaintiff, falsely claiming an absolute right to present by reason of a deed of resignation which was only conditionally delivered by the plaintiff, presented the defendant to the living.

It was contended that, under the circumstances set out in these four paragraphs, the alleged resignation amounted to no resignation at all, the exchange contemplated not having been effected; and Watson's Clergyman's Law, p. 28, and 2 Burns, Ecclesiastical

(1) R. & M. 237. (2) 5 Bligh, N. S. 103.

Law, p. 242, and *Holt and Glover* v. *Bishop of Litchfield* (1), were cited as establishing the proposition that, if a resignation deed is executed resigning a living into the hands of the ordinary with a view to an exchange, and the exchange fails before the institution and induction of both incumbents into their respective livings, the resignation is void.

No doubt this is recognized as the law, at least to the extent of holding the deed to be defeasible, where one of the parties dies before the exchange is completed: see *Downes* v. *Craig* (2), per Parke, B., and p. 177, per Rolfe, B.: but I can find no authority for saying that, as between an incumbent who has resigned his living by deed with a view to an exchange and a new incumbent, the mere fact of that exchange having failed will enable the former to sue the latter in ejectment, even if unconscientiously presented by the patron, in a case where he is in full possession of the living by institution and induction. In such a case, I apprehend that the remedy of the incumbent who should have so resigned would be against the patron, and not against the new incumbent.

In the present case, however, the statement goes on in paragraph 6 to allege that the defendant, "in full knowledge of all the premises," and pretending right therefrom, accepted the presentation and expelled the plaintiff from his possession of (amongst other things) the living; and I am not prepared to say that, if I had thought that the four preceding paragraphs of the statement of claim had clearly shewn facts which would have rendered it unconscientious in the defendant to have accepted the presentation and to have applied for institution and induction, I should not have thought that he should be called upon to answer. But in the statement of claim I only find what appears to me to amount to no more than this, viz. that, at some time between January, 1867, and the date of the writ (January, 1876), all parties were willing and agreed that one Robert Pinckney should be presented to the living, and that the plaintiff executed and delivered the deed to the registrar of the bishop with that intention and for that purpose only. But there is a total absence of all explanation of the circumstances under which Pinckney was not presented; and it is

(1) Hob. 152; Owen, 12. (2) 9 M. & W. 166.

1877

RUMSEY v. NICHOLL.

perfectly consistent with the statement of claim that Pinckney may for good cause have had no desire to be presented to the living, and that, owing to intermediate proceedings, the deed, though originally delivered with a view to an exchange, being an absolute resignation on the face of it, may have been well understood by all parties to have remained in the hands of the bishop without any condition at all, long before the presentation of the defendant.

This would, indeed, appear to be the case from the words at the top of paragraph 2 of the statement of claim,—"and at the time of executing and delivering the said deed, and before and after such execution and delivery,"—unaccompanied by any words shewing that the original intention and understanding spoken of in paragraph 4 continued down to the time of the presentation of the defendant and his taking possession of the living.

I am therefore of opinion that, even if paragraph 6 of the statement of claim, so far as it refers to the knowledge of the defendant, were made out, it would not prevent the defendant from relying on the presentation alleged; and, inasmuch as the latter part of that paragraph states him to be in possession, not only of the rectory-house and glebe, but of the living itself, he is, for the reasons given above, not liable in ejectment upon this statement of claim.

*Judgment for the defendant, with costs.*

Solicitors for plaintiff: *Lee & Pembertons.*
Solicitors for defendant: *Maples, Teesdale, & Co.*

THE TUNBRIDGE WELLS LOCAL BOARD, APPELLANTS; BISSHOPP, RESPONDENT.

1877
*Feb.* 1.

*Public Health Act*, 1875 (38 & 39 *Vict.* c. 55)—*Wilfully exposing an infected Person in a Public Street or Place.*

Sect. 126, subs. 2, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), subjects to a penalty any person who while suffering from an infectious disorder wilfully exposes himself, without proper precautions against spreading the disorder, in any street or public place, &c., or who, being in charge of any person so suffering, so exposes such person.

A medical man in practice in Tunbridge sent a patient who was suffering from scarlet fever to the fever hospital there with a certificate, directing him to walk in the middle of the road, and not to talk to any one, but, in consequence of an alleged informality in the certificate, the patient was refused admission; whereupon the medical man walked with him through the streets of the town to the residence of the chairman of the local board, from whom after some delay he obtained an order for the man's admission to the hospital. He then returned with the patient to the police-station to procure the ambulance to convey him thither.

Upon an information against the medical man for an alleged infringement of the statute, the justices were of opinion that it was not proved before them that the medical man "had charge of" the patient, that he had not wilfully exposed the patient in any street or public place "without proper precaution," and that he had made the best use of the means at his disposal to prevent the spread of the fever; and they refused to convict him:—

*Held*, that their decision was right.

CASE stated by two justices of the peace for the County of Kent under 20 & 21 Vict. c. 43.

At a petty sessions holden at Tunbridge Wells, Kent, a complaint was preferred by the clerk to the local board (hereinafter called the appellants), being the local board of health of the town of Tunbridge Wells, against James Bisshopp (hereinafter called the respondent), under s. 126 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for that the respondent, on the 24th and 25th days of June, 1876, at Tunbridge Wells, being a person in charge of one William Field, who was suffering from a dangerous infectious disorder, did unlawfully and wilfully expose the said William Field, without proper precaution against spreading the said disorder, in certain streets and public places there.

On the hearing of such complaint the appellants appeared by their solicitor, and the respondent by counsel; and, having heard

1877

TUNBRIDGE WELLS LOCAL BOARD v. BISSHOPP.

the evidence adduced in support of the complaint and the respondent's defence thereto, the justices dismissed the complaint, stating the following case for the opinion of the Court:—

1. It was proved that, on the morning of the 24th of June last, one W. Field, who was then suffering from scarlet fever, called at the police-station at Tunbridge Wells, and produced to the constable on duty there a certificate signed by the respondent, a surgeon in practice at Tunbridge Wells, in the following form:—

"I hereby certify that I believe *W. Field,* of *No.* 7, *Castle Street, High Street, Tunbridge Wells,* to be suffering from an infectious disease, and that it is desirable that the case should be isolated. I therefore request that *the case* may be removed to the temporary hospital *and the treatment continued* with less risk to others.

"J. Bisshopp."

In the copy, the italic alterations correspond with the additions to and alterations made by the respondent in the printed form of certificate issued by the appellants for the use of the medical men practising in the district.

The constable thereupon went in search of the sub-inspector of nuisances, who had charge of the ambulance, leaving Field sitting on the steps leading from the public footway into the Town Hall. Not being able to find the sub-inspector, the constable returned to the station and sent an assistant-clerk from the appellants' office with Field to the residence of the sub-inspector.

2. The assistant-clerk went with Field to the sub-inspector's residence, but the latter was still from home; and the assistant-clerk, on examining the certificate produced by Field, declined to give him an order for the ambulance or for his admission into the hospital erected by the appellants for the reception of fever cases arising in the town of Tunbridge Wells, because the respondent had altered the printed form of certificate. (1) The assistant-clerk then advised Field to go back to his lodgings until he got a proper certificate; and Field went away.

(1) The only alteration was this,—Instead of the words "that I may continue the treatment with less risk to others," the certificate as altered ran, "and continue the treatment with less risk to others," the respondent himself not proposing to attend the case.

3. On the evening of the next day, the 25th of June, a constable on duty at the police-station saw Field in the street, and the respondent at the same time came into the station and said that he had a patient there very bad with the scarlet fever, and that, after waiting an hour with him on Tunbridge Wells Common, near the residence of the chairman of the local board, he, the respondent, had procured from the chairman a letter ordering Field to be admitted into the fever hospital. The constable thereupon got out the ambulance, and Field was placed in it and taken to the hospital.

4. It was further proved on the part of the respondent that Field first called upon him on the 24th of June at his surgery at Tunbridge Wells, and the respondent, seeing that Field was suffering from scarlet fever, and hearing that he was lodging in a house in which were other lodgers, gave him the certificate above mentioned, and directed him to take it to the police-station, and in going there to walk in the middle of the road, and not to talk to any one.

5. On the refusal of the assistant-clerk of the appellants to order Field's admission into the fever hospital, Field returned to his lodgings, slept there that night, and on the next day, the 25th of June, went partly by railway and partly by road to Mayfield, where his sister was living; and, his sister having refused to take him in, Field walked back to Tunbridge Wells and again went to the respondent's surgery.

6. The respondent then asked Field to go with him to the residence of the chairman of the local board, and they then walked together across the common to Mount Ephraim, and, after waiting an hour upon the common for the return of the chairman, the respondent went into the chairman's house and shortly afterwards returned to Field with a letter from the chairman containing an order for Field's admission into the hospital; and the respondent then walked with Field to the police-station, where the latter was placed in an ambulance and removed to the hospital.

7. The medical officer of health for a large portion of West Kent, and the medical officer of health for East Sussex, were then called on behalf of the respondent, and stated that in their opinion the respondent had taken the better course in sending Field to

1877

TUNBRIDGE WELLS LOCAL BOARD v. BISSHOPP.

the police-station with a certificate for his admission to the fever hospital, rather than directing him to return to his lodgings.

8. Upon these facts, the magistrates were of opinion,—1. That it was not proved before them that the respondent had charge of Field within the meaning of s. 126, subs. 2, of the Public Health Act, 1875,—2. That the respondent had not wilfully exposed Field in any street or public place without proper precaution against spreading the disorder,—3. That, in all the respondent had done, he had acted to the best of his judgment, and had made the best use of the means at his disposal to prevent the spread of the fever from which Field was suffering. They therefore dismissed the complaint.

The question of law arising on the above statement was, whether or not, upon the facts proved, the magistrates were bound in point of law to convict the respondent. The Court was solicited to remit the case to the magistrates with the opinion of the Court thereon, or to make such other order as to the Court might seem fit.

*H. Matthews, Q.C.*, for the appellants. The question turns upon the construction to be put upon s. 126 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that "Any person who, (1) while suffering from any dangerous infectious disorder, wilfully exposes himself, without proper precautions against spreading the said disorder, in any street, public place, shop, inn, or public conveyance, or enters any public conveyance without previously notifying to the owner, conductor, or driver thereof that he is so suffering; or (2), being in charge of any person so suffering, so exposes such sufferer; or (3) gives, lends, sells, transmits, or exposes, without previous disinfection, any bedding, clothing, rags, or other things which have been exposed to infection from any such disorder; shall be liable to a penalty not exceeding 5*l.*; and a person who, while suffering from any such disorder, enters any public conveyance without previously notifying to the owner or driver that he is so suffering, shall in addition be ordered by the Court to pay such owner and driver the amount of any loss or expense they may incur in carrying into effect the provisions of this Act with respect to disinfection of the conveyance." The question

is whether a medical man who walks through the streets of a populous town with a patient infected with scarlet fever, is a person "in charge" of the infected person within the meaning of the Act. What happened on the 24th of June may be disregarded: but that which took place on the 25th clearly amounts to an offence on the part of the respondent. He walked with Field from his surgery to the residence of the chairman of the local board on Tunbridge Wells Common, and thence to the police-station after waiting on the common one hour.

[DENMAN, J. We will assume that he walked with him in the middle of the street, as he had desired Field to do the day before.]

In *Rex* v. *Burnett* (1), it was held that it is an indictable offence in an apothecary unlawfully and injuriously (2) to inoculate children with the small-pox, and while they are sick of it unlawfully and injuriously to cause them to be carried along a public street.

[DENMAN, J. To bring the respondent within the penal consequences of the Act, it must be shewn that what he did was done "wilfully, and without proper precautions." What precautions has this gentleman failed in? He could not have taken him along the streets in a cab.]

He might have taken him early in the morning or late at night. It is clear the patient himself would be liable: and the person who bids him go or goes with him, and therefore has charge of him, is equally liable.

(1) 4 M. & S. 272.

(2) That is, "in an incautious manner, and likely to affect the health of the public:" per Lord Ellenborough. In passing sentence in that case, Le Blanc, J., observed that "the introduction of vaccination did not render the practice of inoculation for small-pox unlawful, but that in all times it was unlawful and an indictable offence to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a public place of resort."

See also *Rex* v. *Vantandillo* (4 M. & S. 73), where the defendant was indicted for causing patients inoculated with the small-pox to be brought to his surgery whilst infected with the disease.

And see *Best* v. *Stapp*, in a note in Glen on Public Health, 10th ed. 98, where a lodging-house keeper at Eastbourne recovered (and retained) a verdict for 120*l.* against a lodger who knowingly introduced into the plaintiff's house children infected with scarlet fever, in consequence of which the plaintiff lost four of his own children, and was put to expense for medical attendance and their funerals.

1877

TUNBRIDGE WELLS LOCAL BOARD v. BISSHOPP.

[DENMAN, J. Can a man be said to "expose" or to be "in charge of" one who is of full age and a free agent?]

A man weakened by disease may fairly be said to be exposed by the person who is attending upon him: the statute cannot be limited to legal control, or it will become a dead letter.

*Keogh*, contrà, was not called upon.

GROVE, J. I am of opinion that the justices in this case did quite right. There is nothing upon the face of the case to shew that the respondent wilfully exposed the sufferer in a public street or place without proper precautions against spreading the disorder, within the meaning of the statute. The material facts are, that the respondent, a surgeon in practice in Tunbridge Wells, finding a man suffering from scarlet fever, sent him with a certificate to the constable on duty at the police-station in order that he might be conveyed in the ambulance to the fever hospital, telling him to walk in the middle of the road, and not to speak to any one. The assistant-clerk to the local board refused to give an order to the sub-inspector of nuisances for the patient's admission into the hospital, on the ground that certain blanks in the certificate had not in his judgment been properly filled up, and told the man to go back to his lodgings until he got a proper certificate. What occurred on that occasion was clearly not the fault of the medical man. On the following day the respondent took the patient to the house of the chairman of the local board, who after considerable delay gave him a letter ordering his admittance into the hospital, where he was at last received. The medical man seems to have conducted himself with great humanity, and I am at a loss to see how he could have done better than he did. The magistrates were of opinion that it was not proved before them that the respondent "had charge of" the sick man within the meaning of s. 126, subs. 2, of the Public Health Act, 1875. That might possibly be arguable: but it is immaterial, because I am of opinion that the magistrates were quite right in the other two findings, viz. that the respondent had not wilfully exposed the sufferer in any street or public place without proper precautions against spreading the disorder; and that in all he had done he had acted to the best of his judgment, and had made the best use

of the means at his disposal to prevent the spread of the fever. It seems to me that all the evidence points that way.

DENMAN, J. The only question presented to us by the justices is, whether or not, upon the facts proved, they were bound to convict the respondent. I must say I entertain great doubt whether any question of law is raised at all. In the first place, the justices state that they were of opinion that it was not proved before them that the respondent had charge of Field within the meaning of s. 126, subs. 2, of the statute. Now, there may be cases in which the patient may be utterly unable to take care of himself, and where a medical man may so conduct himself as to justify the justices in finding that he had him in charge. But it by no means follows that merely walking by the side of a man who is able to walk alone will bring him within that category. I cannot therefore say that the justices were bound to hold that the respondent had charge of Field; nor am I prepared to say that their decision upon this point was unreasonable. With respect to the exercise of proper precautions, I think that involves a question of fact. The clause in question refers to two cases,—1. that of a person wilfully exposing himself without proper precautions against spreading the disorder,—2. that of a person who, being in charge of any person so suffering, so exposes the sufferer. I think the magistrates would have been well justified in finding that there had been no exposure at all. The poor man having been improperly refused admission to the hospital on the first occasion, the doctor walked with him the next day to the residence of the chairman of the local board. Whether or not he did so without proper precautions against spreading the contagion was a question of fact. It appears that on the first day he gave the patient good advice; and there is nothing to shew that he was guilty of any want of caution when he himself went with him. The justices have found that the respondent did not expose Field without proper precaution against spreading the disorder, and that he made the best use of the means at his disposal to prevent the spread of the fever. That is a finding of fact, upon which I entirely agree with them. I doubt whether any question of law is involved in the case at all.

1877

TUNBRIDGE WELLS LOCAL BOARD v. BISSHOPP.

*Keogh*, for the appellant, asked for the costs as well of the proceedings below as of the appeal.

GROVE, J. The Master tells us that we have no jurisdiction over the costs below. We can, therefore, only deal with the costs of the appeal.

*Decision affirmed, with costs.*

Solicitors for appellants: *Halse, Trustram, & Co., for W. C. Cripps, Tunbridge Wells.*

Solicitors for respondent: *Hughes, Hooker, Buttanshaw, & Murton.*

---

1876
*Dec.* 7.

[IN THE COURT OF APPEAL.]

GRIFFITH AND WIFE *v.* TAYLOR.
THATCHER *v.* TAYLOR.

*Action for False Imprisonment—Right to Notice of Action under ss.* 103, 113, *of* 24 *&* 25 *Vict. c.* 96—"*Found committing*"—"*Immediately apprehended.*"

In an action for false imprisonment, defendant set up as a defence that he had had no notice of action, to which he was entitled under s. 113 of 24 & 25 Vict. c. 96: for that he had caused plaintiff to be arrested under s. 103, believing he had found her committing a felony. The jury found that plaintiff had not committed the felony, but that defendant bonâ fide believed, and on reasonable grounds, in the existence of facts which would have justified him in acting as he had done. On this finding the verdict was entered for defendant. Plaintiff had not been apprehended on the spot where defendant believed he had found her committing the felony, and the question, whether or not she had been "immediately apprehended," had not been left to the jury:—

*Held*, that this was a question of fact for the jury which ought to have been left to them, and that there must therefore be a new trial.

THESE were two actions tried together, arising out of the same circumstances, the plaintiff in the second action being the sister of the female plaintiff in the first action; the pleadings in the two actions were identical.

First count, for false imprisonment, in giving the female plaintiff into custody of a policeman on a charge of felony, and causing her to be imprisoned at a police station until she was dismissed by the inspector, by reason of the defendant not appearing to prosecute.

Second count, for malicious prosecution of the female plaintiff before justices, on a charge of stealing a box of eggs.

Pleas, To the first count, 1. Not guilty by statute (24 & 25 Vict. c. 96, ss. 1–4, 91–99, 103, 113).

2. Setting out all the facts, and justifying on the ground that the defendant had reasonable and probable cause for suspecting the plaintiff to be guilty of having stolen the box of eggs.

3. To the second count, not guilty, and other pleas which it is unnecessary to give.

At the trial before Brett, J., at the sittings in Middlesex after Michaelmas Term, 1874, it appeared that the defendant lived at Reading. On an evening in July, 1874, he was about to proceed by the 9 p.m. train from Oxford to Reading, and he left a small deal box containing eggs on the counter of the book-stall on the platform at the railway station, while he went into the refreshment-room; on his return the box was gone, and as the train was about to start, he was obliged to get into the train without searching for it. The first place at which the train stopped was Reading, where he got out and went along the train with the guard, and found his box under the seat in a third-class carriage in which the two female plaintiffs were seated. The guard went for the station-master; while he was gone, the plaintiffs, as the defendant swore, moved the box and endeavoured to conceal it with their petticoats; he took the box away, charging them with having stolen it, and requested the station-master, who had come to the carriage with the guard, to take them into custody. The station-master declined to do so; and in the meantime the male plaintiff and four other male companions had returned from the refreshment room to the carriage, and the train started, carrying the plaintiffs to London, the defendant remaining at Reading. He communicated immediately with the police at the Reading station, and they at his instigation telegraphed to the police at the Paddington station (the train not stopping between Reading and Paddington) to take the two female plaintiffs into custody, describing them and the carriage they were in, and what they were charged with, and saying the prosecutor would come up by the "fast" train in the morning; this, however, was read "first" train. The plaintiffs were arrested by the police in London, and kept

1876

GRIFFITH v. TAYLOR.

in the police station till the first train, the mail train, arrived from Reading, at 4.30 a.m., and the defendant not being in it, the police inspector let the plaintiffs go, having first ascertained that they had given a true address. They were a day or two afterwards arrested under warrants, and taken before the magistrates at Oxford. The charge was dismissed by the bench, but not unanimously. No notice of action had been given.

The counts for false imprisonment were abandoned in the course of the trial.

The jury, in answer to questions by the judge, stated that they were unable to agree as to whether a felony had been committed; but they found that the plaintiffs had not stolen the box, that the defendant bonâ fide believed that the plaintiffs had stolen the box, and believed bonâ fide, on reasonable grounds, facts, which, if true, would have justified him.

A verdict, by consent, was taken in each action for the plaintiff on the second plea, with nominal damages; and on the first plea the verdict was directed to be entered for the defendant, on the ground that, on the finding of the jury, he was entitled to notice of action. (1)

A rule for new trial was afterwards obtained, on the ground, inter alia, of misdirection, that the judge did not sufficiently direct the jury as to the meaning of the words "found committing," so as to enable them to decide whether, upon the facts, the defendant was entitled to notice of action under the statute. That the

Post 198

(1) 24 & 25 Vict. c. 96 (An Act to consolidate and amend the Statute Law of England and Ireland relating to larceny and other similar offences), s. 103: "Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law; . . ." s. 113. "All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon; . . ."

judge misdirected the jury in telling them that "if such a state of things existed as gave the defendant reasonable and probable cause to suspect and believe, and if he did honestly and bonâ fide believe, that the plaintiffs had stolen the box, the defendant would be entitled to the verdict;" and the judge ought to have told the jury that, to entitle the defendant to notice of action, they must find that he honestly and bonâ fide believed the plaintiffs were found committing the offence for which he gave them into custody.

The rule was argued on the 11th of Jan., 1876, before Lord Coleridge, C.J., and Brett and Archibald, JJ., who took time to consider; and on the 28th of April, 1876, the judgment of the Court was delivered by Lord Coleridge, C.J., making the rule absolute. (1)

The defendant appealed.

The grounds of appeal were: That there was no misdirection by

(1) After stating the pleadings, the facts, and the findings of the jury, Lord Coleridge, C.J., proceeded: Till almost the very end of the argument before us, we were under the impression, an impression shared by my learned Brother who tried the case, that the arrest was a continuing one; that the plaintiffs had been bailed and had appeared at Oxford in consequence of the arrest which took place at Paddington on the arrival of the plaintiffs from Reading. This gave rise to a lengthened and elaborate argument on the true construction of the words "found committing" in s. 103 of 24 & 25 Vict. c. 96, whether the conduct of the defendant was within the protection of that section, and whether therefore he was entitled to notice of action under s. 113 of that statute. But it now appears that the arrest upon which the plaintiffs were carried to Oxford and there examined, and in respect of which it was suggested that the provisions of s. 103 had been substantially followed, was entirely distinct from and unconnected with the first arrest at Paddington and the detention in the police-station there, for which the action was brought, and to which alone the language of the first count of the declaration is applicable. This could not be denied upon reference to the dates of the warrants upon which the plaintiffs were taken to Oxford; indeed it was at once, when mentioned, properly conceded by the plaintiffs' counsel. It is indeed unfortunate that the attention of my learned Brother, at the trial, and that our attention, on the argument, was not called to the true state of facts. As matters now stand, however, it becomes unnecessary, and indeed impossible, for us to discuss questions which do not arise, and cannot arise, upon the facts of this case. The misapprehension to which I have adverted, in point of fact led naturally, indeed inevitably, to misdirection in point of law. No such justification as the jury have in fact found, and no such considerations as they were directed to entertain, really existed on the facts of the case; and on this short but decisive ground the rule must be absolute for a new trial in both cases.

1876

GRIFFITH v. TAYLOR.

the judge at the trial leading to the verdict for defendant; and that the Common Pleas Division were in error in holding that defendant could not be protected by s. 103 of 24 & 25 Vict. c. 96, and the other sections relied on in the plea, because plaintiffs were not kept in arrest until they were brought up for examination before a magistrate under the circumstances stated in the evidence.

Dec. 6. *Jelf* and *Bosanquet*, for the defendant. It cannot be now disputed that, upon the latest authorities, in order to entitle the defendant to notice of action under s. 113 of 24 & 25 Vict. c. 96, it is sufficient that he acted under a bonâ fide belief in the existence of circumstances which, if they had really existed, would have justified him in arresting the plaintiffs under s. 103. (1) The rule was originally obtained in the Court of Common Pleas on the ground that the jury had not found that the defendant believed that the plaintiffs were found committing the offence. The jury, in consequence of the way the judge left the case to them, found that the defendant bonâ fide believed that the plaintiffs had stolen the box, and that his belief was founded on reasonable grounds. This was more than was necessary, as it has been determined in several cases that the bonâ fide belief is sufficient. But if the defendant bonâ fide believed that the plaintiffs stole the box, he must have believed that they were found committing the felony: for the box was in their possession at Reading, and consequently if they took it at Oxford, as the defendant must have believed, there was a continuing asportavit at Reading. The judgment in the Court below, however, did not proceed on any such ground as this, but on the ground, apparently, that, as the taking of the plaintiffs before the magistrates at Oxford was not in consequence of their apprehension at Paddington, but under warrants, there had not been a taking "forthwith" before a magistrate, and consequently s. 103 had not been pursued, and the defendant could not be entitled to the verdict on the first plea. That, it is submitted, is clearly erroneous; if the defendant did all he could, and all he ought, up to the arrest, it was not his fault that the apprehension proved abortive; that was the fault of the police in allowing the plaintiffs to go without taking bail.

(1) Ante, p. 196.

[COCKBURN, C.J. It is difficult to understand the ground of the judgment of the Common Pleas Division, but if that is the ground, I must say I cannot agree with it. It was the defendant's business to apprehend, or cause the plaintiffs to be apprehended, and the business of the police to take them before the magistrates. But there is a more formidable objection, to my mind, in the defendant's way—Was the apprehension of the plaintiffs "immediate?"]

The defendant made hot pursuit, which is all that "immediate" means. It is sufficient if a man acts reasonably within the statute; he need not follow it to its very letter: *Read* v. *Coker*. (1) The station-master refused to take upon himself to arrest the plaintiffs at Reading; no policeman was on the spot, and the defendant could not have arrested them himself, and the train went on. He immediately telegraphed to Paddington, the train not stopping at any previous station; which is precisely as if he had raised a hue and cry, and pursued the plaintiffs. The pursuit here was commenced immediately on the commission of the offence, not as in *Downing* v. *Capell*. (2)

*D. Seymour*, *Q.C.*, and *Culpepper*, for the plaintiffs. The question which ought to have been left to the jury was whether the defendant bonâ fide believed that the plaintiffs were found committing the offence: *Roberts* v. *Orchard*. (3) "Found committing" must be construed strictly: *Horley* v. *Rogers*. (4) The felony, if committed at all, must have been committed at Oxford, so that the plaintiffs could not be found committing it at Reading; and though it has been held that there need not be a reasonable ground for the belief, still there must be some facts on which the belief can be founded: *Chamberlain* v. *King*. (5)

[COCKBURN, C.J. I question whether the finding of the jury as to this is not sufficient, looking at the facts. The jury have found that the defendant believed the plaintiffs to have stolen the box; and if they stole it the asportavit was continuous, and amounted to a fresh taking at Reading (see 1 Hale's P. C. 507–8), and if so, the defendant might well have believed that they were found committing the offence.]

17 Jur. 990

(1) 13 C. B. 850; 22 L. J. (C.P.) 201.
(2) Law Rep. 2 C. P. 461.
(3) 2 H. & C. 769; 33 L. J. (Ex.) 65.
(4) 2 E. & E. 674; 29 L. J. (M.C.) 140. 6 Jur. N.S. 605.
(5) Law Rep. 6 C. P. 474.

1876

GRIFFITH v. TAYLOR.

But then there was no immediate arrest at Reading: and there the box was taken away from them. It might not be convenient to the defendant to make the arrest himself, and possibly he acted with a wise discretion in not attempting it; but the offender must be taken ipso facto committing the offence, and forthwith taken before a magistrate: *Rex* v. *Curran* (1); neither of which things was done in the present case.

Dec. 7. *Bosanquet*, in reply. It is sufficient to entitle the defendant to notice of action that he bonâ fide believed that the plaintiffs were committing the offence, even if they really were not guilty.

[BRAMWELL, J.A. The old case of *Cann* v. *Clipperton* (2) is to that effect.]

As to immediate apprehension, if the offender escapes and is arrested after fresh pursuit, that is sufficient. In *Hanway* v. *Boultbee* (3), Tindal, C.J., said: "The words of the present statute" [7 & 8 Geo. 4, c. 30, s. 28, which are essentially the same as those of the present Act] "must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away and immediate and fresh pursuit to be made: I think that would be sufficient. So in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an immediate apprehension.". . So, in the present case, as soon as possible the police were called in and the plaintiffs arrested.

COCKBURN, C.J. I am of opinion that the order of the Common Pleas Division for a new trial should be affirmed, though not on the grounds on which that Court is said to have proceeded; I confess, however, I do not quite understand the judgment.

The question turns on ss. 103 and 113 of 24 & 25 Vict. c. 96. [The Lord Chief Justice read the two sections.] According to the latest authorities on the subject of notice of action for

(1) 3 C. & P. 397. (2) 10 A. & E. 582.
(3) 1 Mood. & Rob. 15, 18–19.

anything done in pursuance of a statute, the law is that in order to entitle a party to notice he must have acted under the bonâ fide belief in the existence of circumstances which, if they had really existed, would have amounted to a justification. The decision in the present case turns on two separate and distinct parts of s. 103. The first relates to the person arrested having been "found committing" an offence against the statute; and as to that part of the case the question of the bonâ fide belief of the defendant is essential. The second part relates to the "immediateness" of the apprehension, and there the question turns, not on what was in the mind of the defendant, but on what was actually done by him. On the one question, bonâ fide belief in a certain state of facts is enough, although no felony was actually committed; on the other, it is necessary, in order to obtain the statutory protection, to shew that the defendant acted in conformity with the Act. While in the one case misapprehension of fact, if bonâ fide entertained, will not disentitle him to the protection, in the other misapprehension of the law, that is, of what the statute enables him to do, will disentitle him. If the defendant acted under a bonâ fide, though mistaken, belief that the persons arrested had been found committing the offence, he would be so far within the protection of the statute; but if he acted under a mistake of the meaning of the words "may be immediately apprehended," and caused the plaintiffs to be arrested under circumstances which would make the apprehension not immediate, he would not be protected. That the defendant bonâ fide believed that a felony had been committed I cannot doubt, and the circumstances were well calculated to engender that belief; and if a felony had been committed, he would have been justified in apprehending the plaintiffs; but the question is, whether what he did, acting under the bonâ fide but mistaken belief that they had committed a felony, was within the statute. If a felony had been committed, I think it clear the plaintiffs would have been found committing the offence at Reading. It was, indeed, argued for the plaintiffs that the offence was committed, if anywhere, at Oxford, as the box was left by the defendant on the platform there; that it was taken thence by some one and put into the carriage in which the plaintiffs were, where it was

1876

GRIFFITH v. TAYLOR.

found at Reading. No doubt, if the box was feloniously taken at Oxford, and put into the carriage, the offence was complete at Oxford, as then there must have been an asportavit there, any removal, however slight, amounting to an asportavit. But if a stolen chattel is carried over a considerable space by the thief, the asportavit continues so long as the removal continues, and the taking, in point of law, continues too. So that, if the plaintiffs did steal the box at Oxford, though the defendant would have been justified in arresting them there, yet, as they were still carrying the box away, the defendant would have been justified in arresting them at Reading; for in law and in fact they would have been there found committing the offence of larceny. The jury, however, have found that the plaintiffs did not commit the offence, so that their actual guilt was negatived; but then, as the jury were fully justified in finding that the defendant bonâ fide believed (and on reasonable grounds) that the plaintiffs had stolen the box, and consequently were committing a felony at Reading, he was so far within the protection of the statute.

But then we come to what the defendant actually did; and on this part of the case it becomes necessary to say whether the apprehension of the plaintiffs was immediate. Now s. 103, although the legislature may have had cases of misdemeanor more immediately in view, is large enough to include, and clearly must be taken to include, cases of felony; and when an offence within the statute is committed, any person found committing the offence may be apprehended at once by any person without warrant,—if it be done on the spot or "immediately,"—and at once taken before a magistrate. But although "immediately" is a strong word, and must, I think, be taken to mean "then and there," still it must receive a reasonable construction, and if arrest on the spot is impossible, and can only be effected by pursuit, if the pursuit is immediately set on foot and so the party is arrested, then I think he would be "immediately apprehended" within the meaning of the section, although the apprehension took place not on the spot but at some distance from it. But then, in every case it must be a question of fact whether the apprehension is immediate or not. In the present case, if by application to the station-master the defendant could have stopped the train, and the police would have

been called in, and the plaintiffs arrested at once, and the defendant had preferred to let them go on, and then sent after them and had them apprehended in London, merely because it was a mode of proceeding more convenient to himself, the apprehension would not have been immediate. On the other hand, if the apprehension of the plaintiffs at Reading was, under the circumstances, impossible, and the defendant had himself gone in pursuit,—if, for instance, he had got into the same train, or gone up by a faster train, and so apprehended the plaintiffs on their arrival in London, or if he had deputed some other person to go and do this for him, and that person had arrested the plaintiffs, I am far from saying that the apprehension would not have been immediate. So possibly the use of what may be called the equivalent means, which science afforded him, of the electric telegraph, would be sufficient, provided he availed himself of the first opportunity to effect the arrest. I am, however, far from wishing to be understood as laying it down that the circumstances of the present case justified the course which the defendant pursued. We are not called upon to decide whether the arrest was immediate. When the circumstances are intricate, the question becomes one of degree, and must be determined as a question of fact, and as such is clearly for the jury. We therefore cannot take upon ourselves to say the apprehension was immediate: we can only say that "immediately" ought to be liberally interpreted. But the question was not left to the jury, and we are therefore agreed that there must be a new trial; not on the ground put forward by the plaintiffs' counsel, that the jury have not found that the defendant believed that the plaintiffs were found committing the larceny, but on the ground that it is left uncertain whether the defendant may or may not have effected the "immediate" apprehension of the plaintiffs, so as to bring himself within the protection of the statute.

BRAMWELL, J.A. I also think that this appeal ought to be dismissed, and on the same grounds. I will add nothing to what the Lord Chief Justice has said as to the plaintiffs having been found committing the offence. Supposing a felony was committed by taking the box at Oxford, the plaintiffs were still committing the offence at Reading, and were found committing it.

1876

GRIFFITH v. TAYLOR.

On the other question, it is extremely difficult to lay down any general rule, it is a question of degree, whether the pursuit and apprehension of the offender are immediate or not. I am by no means sure whether the judge ought not to have told the jury that the plaintiffs were not immediately arrested: for the offence had ceased to be committed as soon as the box was taken from them at Reading. I am not sure that it makes any difference in point of law, when the arrest is not on the spot at which the person is found committing the offence, whether it was because the person arresting could not, or because he would not, make the arrest on the spot. If the defendant had at first said he would not arrest the plaintiffs, and then had changed his mind and had telegraphed to London to arrest them, that could not have been said to be an immediate arrest. But I agree with the Lord Chief Justice, if this is not a matter of law to be ruled in favour of the plaintiffs, it is certainly not a matter of law to be ruled in favour of the defendant. The question whether there was an immediate apprehension is a question for the jury, which was not left to them, and the consequence is inevitable. There must, therefore, be a new trial; and, in my opinion, the proper course would be that it should be left to the jury to find the facts, reserving leave to either party to move to enter judgment.

AMPHLETT, J.A. I am of the same opinion, and am much of the same opinion as my Brother Bramwell as to the question to be left to the jury; I only wish to say that as the case must go back for a new trial, I think it ought to be left to the jury to find the exact circumstances as to what occurred at Reading, and as to the apprehension of the plaintiffs in London. If there could, as matter of law, be an immediate apprehension in London for an offence committed in Reading, I do not think the facts are so before us as to enable us to decide this point. For my own part, as a matter of law, I should have said it was impossible that there should be an apprehension in London for an offence committed at Reading, so as to enable the jury to say that the defendant had bonâ fide believed that the plaintiffs had been found committing an offence and had had them immediately arrested. I think the intention of the statute must have been that the arrest should be then and there;

and if the offender gets away, or is not taken in immediate and hot pursuit, however shortly afterwards, his arrest cannot be considered as immediate within the statute. As I have said before, the case must go back, and I think the exact facts should be found.

*Order affirmed.*

Solicitor for plaintiffs: *E. M. Chubb.*

Solicitor for defendant: *C. Mallam, for T. & G. Mallam, Oxford.*

---

[IN THE COURT OF APPEAL.]

1877
*Jan.* 26.

ROURKE *v.* THE WHITE MOSS COLLIERY COMPANY.

*Master and Servant—A. not liable for the Negligence of his Servant while employed under the Control of B.*

The defendants, having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labour, the defendants to provide and place at the disposal of W. the necessary engine power, ropes, and hoppets, with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer:—

*Held*, affirming the judgment of the Common Pleas Division, that though the engineer remained the general servant of defendants, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of defendants, who were therefore not liable for his negligence.

APPEAL from the decision of the Common Pleas Division, making absolute an order to enter judgment for defendants. (1)

The action was for injuries caused to plaintiff by the negligence of defendants' servants; and was tried before Lush, J., at the Liverpool winter assizes, 1875.

The defendants were the owners of a colliery, and had begun sinking a pit or shaft, for which purpose they employed workmen (among whom was the plaintiff), and had erected a steam engine near the mouth of the shaft, and employed men to drive it. Having sunk some depth, they entered into an agreement with Roger Whittle to carry on the work for them. The following

(1) 1 C. P. D. 556.

1877

ROURKE v. WHITE MOSS COLLIERY CO.

were the terms of the agreement, &c., detailed by the managing director of the defendant company in answer to interrogatories:—

"3. The sinking and excavating were executed by Roger Whittle, contractor, under a verbal contract, at a certain price per yard, Whittle to find and provide all labour necessary for such sinking, and the company to provide and place at the disposal of Whittle the necessary engine power, ropes, and hoppets, with two engineers to work the engine, one for the day and one for the night, such engineers, engine, and hoppets being under the control of the contractor.

"4. The engine, pulley, and hoppet which were used to bring to the surface the stuff excavated in the shaft were the property of the defendants, but were at the time of the accident under the control of the contractor.

"5. Ellis Lawrence, engineer, was in charge of the engine, pulley, and hoppet on the 27th of October, 1874, under the control of Whittle. Lawrence was employed by the defendant company, who on the 7th of November, paid him for his work from the 21st of October to the 3rd of November."

On the 27th of October, 1874, the plaintiff, being one of the men employed and paid by Whittle, was working at the bottom of the shaft, when, owing to Lawrence, the engineer, falling asleep, the engine was not stopped at the proper time, and the hoppet was overturned, and fell with its contents on the plaintiff below, and injured him severely.

A verdict was found for the plaintiff for 300*l.*, with leave to move to enter judgment for the defendants, if the Court should be of opinion that the defendants were not liable to the plaintiff for Lawrence's negligence.

The Common Pleas Division ordered judgment to be entered for the defendants. (1)

The plaintiff appealed.

*L. Temple, Q.C.*, and *Gully*, for the plaintiff. The Common Pleas Division decided this case on the ground that the plaintiff and Lawrence were fellow-servants; but that is not so. There

(1) 1 C. P. D. 556.

must be not only a common employment but a common employer. The plaintiff was clearly the servant of Whittle, for he was hired and paid by Whittle, whereas the engine-driver was as clearly the servant of the defendants, being hired and paid by them. *Wiggett* v. *Fox* (1) was the case chiefly relied on by the Common Pleas Division; but there the defendants had the control of the whole work. The facts are within the principle of *Abraham* v. *Reynolds* (2), in which case, although the work was all done for the defendants, yet the defendants were held liable, as the plaintiff was not either hired or paid by the defendants. *Murray* v. *Currie* (3) was also relied on for the defendants; but there the plaintiff was in the employ of the stevedore, and the defendant, the shipowner, had left everything to him; and, though the person guilty of the negligence was one of the defendant's crew, yet he was employed and paid for the particular work by the stevedore. [They also referred to *Bartonshill's Coal Co.* v. *Reid* (4), *Dalyell* v. *Tyrer* (5), and *Morgan* v. *Vale of Neath Ry. Co.* (6)]

*Herschell, Q.C.*, and *M'Connell*, for the defendants. First, the plaintiff and Lawrence were in the common employment of the defendants within the rule. In *Wiggett* v. *Fox* (1) the facts were very similar to the present, and that case is an authority that the plaintiff and Whittle were the servants of the defendants.

[COCKBURN, C.J. I doubt the correctness of that decision. Baron Channell, in *Abraham* v. *Reynolds* (2), explains the facts in *Wiggett* v. *Fox* (1). If the facts were as the learned Baron says, they may support the decision.]

If the work is not to be considered as being done for the defendants as employers of the whole body of persons engaged in the work, then, secondly, none of the persons engaged were in their employ, and Lawrence, whose negligence caused the injury to the plaintiff, though hired and paid by the defendants, was at the time of the accident the servant of Whittle, being entirely under his control. The act of Lawrence which caused the injury was the negligent carrying out of Whittle's orders. It is said that Whittle

(1) 11 Ex. 832; 25 L. J. (Ex.) 188.
(2) 5 H. & N. 143.
(3) Law Rep. 6 C. P. 24.
(4) 3 Macq. H. L. 266.
(5) E. B. & E. 899; 28 L. J. (Q.B.) 52.
(6) 5 B. & S. 570; 33 L. J. (Q.B.) 260.

1877

ROURKE v. WHITE MOSS COLLIERY CO.

could not dismiss Lawrence; but a servant may be the general servant of one person, and yet may be the servant of another for a particular purpose: *Murray* v. *Currie.* (1)

*L. Temple, Q.C.*, in reply.

COCKBURN, C.J. I am of opinion that the judgment of the Common Pleas Division should be affirmed. My mind has fluctuated during the argument; but I have been led to the opinion I have formed by the answers given to the interrogatories by the managing director of the defendant company. It is quite unnecessary to say whether the case of *Wiggett* v. *Fox* (2), which was relied on for the defendants, was rightly decided. My own view is that it was not; though I might agree with the decision if I could come to the conclusion that the facts were what Baron Channell appears to have thought they were, in the explanation he gives of that case in *Abraham* v. *Reynolds.* (3) But I cannot agree that the facts were as the learned Baron states them. It is, however, unnecessary to express any decided opinion on that case, because it does not apply to the present, the facts being different. I regret that our decision must be against the plaintiff, for he has sustained a serious injury owing to the negligence of a man who undoubtedly was at the time of the accident the general servant of the defendants, and who had been placed by them in the position he occupied. But these circumstances afford no ground, in point of law, for visiting the defendants with the result of the man's negligence, if he was not in point of fact their servant at the time, in the sense of being actually employed to do their work. If the agreement had been that, whereas Whittle was to sink the shaft and get away the soil, and do all the necessary work to make a proper shaft, yet that incidentally to this work the defendants had undertaken to do part of it themselves by means of their machinery and servants—so that this part of the work would have been carried on independently of Whittle and not under his control—then the defendants would have been liable. For in that case Lawrence, the engineman, would have continued to be the servant of the company, and would have been working as their

(1) Law Rep. 6 C. P. 24. (2) 11 Ex. 832; 25 L. J. (Ex.) 188.
(3) 5 H. & N. at pp. 149–150.

servant at their work. But when we look at the answers to the interrogatories the facts amount to no more nor less than this: Whereas Whittle would have been obliged to hire an engine and engineers in order to carry out the excavation which he had undertaken, the company, having already an engine and attendants on the spot, say to the contractor, "We have got an engine and enginemen ready, and it shall be part of the contract that we will let you have them to do your work and to be under your control, and we will pay you so much the less per yard than we should have done had you been obliged to find the engine and pay the engineer yourself." It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. Looking at the present case, I think we must arrive at the conclusion that Lawrence was practically in Whittle's service at the time he was guilty of the negligence complained of; and this being so, it follows that Lawrence became the fellow-servant of the plaintiff; and it is settled law, which it is now too late to disturb, that a servant cannot recover damages from his employer for any injury he may have sustained through the negligence of a fellow-servant. Therefore, Lawrence and the plaintiff, being fellow-servants in the employ of Whittle, it follows that the plaintiff cannot maintain an action against the defendants. The judgment must, therefore, be affirmed.

MELLISH, L.J. I am of the same opinion. There are two questions: First, whether Lawrence, in doing the act complained of, was acting as the servant of the defendants, or of Whittle. If he was not acting as the defendants' servant, they would not be liable; but if he was acting as the servant of the defendants they might be liable. But then the second question would arise whether or not the plaintiff was his fellow-servant. In the result at which I have arrived it becomes unnecessary to answer the second question, because I think that the effect of the

1877

ROURKE v. WHITE MOSS COLLIERY CO.

evidence is that Lawrence was not acting as the servant of the defendants at the time the injury occurred to the plaintiff.

The question of law applicable to this case was much considered in this Court in the case of *Purnell* v. *Great Western Ry. Co. and Harris* (1), in which case the Master of the Rolls very clearly pointed out that A.'s servant might, for a particular purpose or on a particular occasion, be the servant of B., though he continued the servant of A. and was paid by him. In that case we had to consider whether, on the peculiar facts, the persons who had been guilty of negligence were at the time acting as the servants of the company, or of Harris, in whose service they undoubtedly were. And though the particular work they were doing was for the benefit of the company, as it was part of the work which the company had undertaken to do, namely, bringing and unloading the timber for the work, yet as it appeared that they were acting under the immediate orders of their master, we thought, on that ground, that they still remained the servants of their own master, Harris. But we all thought that, if they had been acting under the orders of the Great Western Company's superintendent, they would have become the servants of the company, notwithstanding they remained the general servants of Harris and were paid by him.

In this case it is not disputed that Lawrence was the general servant of the defendants, being hired and paid by them; but the question is, whether he was not lent, so to speak, to Whittle, so as to become his servant for this particular work. It appears from the evidence, and more particularly from the answers to the interrogatories, that Whittle undertook, as one general contract, the work of continuing the making the shaft which the defendants had begun, including the bringing up of the soil excavated and the letting down and bringing up the workmen, which involved the use of a steam engine and the necessary gear. It naturally happened that the defendants had an engine on the spot and engineers already engaged, so that it was for the mutual benefit of both parties that the company's engine and men should do the work, and it was accordingly agreed that the company should place at the disposal of Whittle the necessary engine-power,

(1) Reported, on a point of practice, 1 Q. B. D. 636.

ropes, and hoppets, with two engineers, one to work the engine by day and the other by night, such engineers being under the control of the contractor. The effect of this agreement was that the whole job was let out to Whittle, but the engine was to assist him in doing the work, and the engineer, though remaining the general servant of the defendants and paid by them, was, while working at this shaft, to act under the control and orders of Whittle. That, in my opinion, makes the acts of Lawrence, while working the engine, the acts of Whittle and not of the defendants. Lawrence's duty, according to the orders of Whittle, was to have stopped his engine at the proper time, and not doing this, he was negligent in not obeying the orders of Whittle, and this in law amounted to the negligent act of Whittle. It follows that the defendants are not liable; and it is unnecessary to consider whether the plaintiff was the fellow-servant of Lawrence in Whittle's employ.

BAGGALLAY, J.A. It is immaterial to consider whether Lawrence was the servant of Whittle for all purposes; it is sufficient if he became servant of the contractor for the purposes of the work in which he was engaged at the time of his negligence. The contract of Whittle was to make the shaft or pit, not merely to sink a shaft; and it was as much part of the work to bring up the excavated material as to sink. But the company were to put at his disposal the engine and engineman in order to enable him to raise and dispose of the excavated soil. It was urged that it was the duty of the defendants to supply the engine and pay the engineman; and no doubt it was so, but the terms were that the engineman was to be under the orders and control of the contractor himself. It was necessary for the due carrying on of the works that the man regulating the sinking and excavating should also regulate the bringing up of the stuff excavated. Therefore, as far as regards this particular work, Lawrence was acting as servant of the contractor. This, as I have said, renders it unnecessary to consider whether the plaintiff and Lawrence were in one common employment.

BRAMWELL, J.A. I think this is the case of common employment; and I think it most undesirable that where two men are in

1877

ROURKE v. WHITE MOSS COLLIERY CO.

the same service the master should be liable to the one for damage caused by the negligence of the other. I can see no reason for it, except that it may be convenient that there should be a defendant who can answer in damages. It seems to me to be a sufficient protection to the servant that the master is under the obligation to provide servants competent for the work in which they are to be employed. If the plaintiff and Lawrence had been in the defendants' service and Lawrence had been proved to be unskilful, and the accident had happened through his unskilfulness, the plaintiff would have had a right of action against the defendants; so if the engine had been ill-constructed.

I agree that the judgment must be affirmed, on the ground that Lawrence was not the defendants' servant at the time.

*Judgment affirmed.*

Solicitors for plaintiff: *Torr, Janeway, Taggart, & Co., for Edwin Hughes, Liverpool.*

Solicitors for defendants: *Gregory & Co., for H. S. Malton, Liverpool.*

---

*Feb.* 2.

[IN THE COURT OF APPEAL.]

BRANTOM *v.* GRIFFITS AND OTHERS.

*Bill of Sale—Bills of Sale Act* (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Growing Crops not "Goods or other Articles capable of complete Transfer by Delivery."*

A document,—by which A. agrees to sell to B. "five acres of wheat now standing in, &c., at 6*l.* per acre, B. to cut and carry the corn any time he may require; and B. agrees to purchase the said five acres upon the above conditions,"—is a bill of sale within the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, as the intention is apparent to pass the immediate property.

Growing crops are not "personal chattels" within s. 1, which is defined by s. 7 to "mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery."

APPEAL from the decision of the Common Pleas Division making absolute an order to enter judgment for the plaintiff. (1)

This was an interpleader issue, in which the defendants were the execution creditors of the Misses Miles, and had seized in July, 1875, inter alia, growing crops on the farm occupied by them,

(1) 1 C. P. D. 349.

and the plaintiff claimed the crops under several documents which had been executed by Miss A. Miles (acting for herself and sisters) early in the year, in the following form:—

"Miss A. Miles hereby agrees to sell to W. Brantom five acres of wheat, now standing on the Beeches, at the sum of 6*l.* per acre; W. B. to cut and carry the corn any time he may require; and W. B. doth hereby agree to purchase the said five acres of corn as mentioned above on the above conditions.

"A. Miles,
"W. Brantom."

The documents had not been registered as bills of sale.

Two points were raised: first, whether the documents were bills of sale; secondly, whether growing crops were within the Bills of Sale Act (17 & 18 Vict. c. 36), ss. 1, 7.

The Common Pleas Division decided that the documents were bills of sale; but that growing crops were not within the Act; and that the plaintiff's title was therefore good against the defendants. (1)

The defendants appealed.

1876. Nov. 30. *Metcalfe, Q.C.*, and *Graham*, for the defendants.

1877. Feb. 6. *Merewether* and *Clare*, for the plaintiff.

The arguments were the same as in the Court below; in addition to the cases there cited, the following authorities were referred to for the plaintiff: *Washbourn* v. *Burrows* (2); *Ex parte Reynal* (3); *Boydell* v. *M'Michael* (4); *Peacock* v. *Purvis* (5); *Meux* v. *Jacobs* (6); *Hodgson* v. *Gascoigne*. (7)

*Graham*, in reply, referred to *Jones* v. *Flint* (8); *Crosby* v. *Wadsworth* (9); Godolphin's Orph. Leg., part iii., ch. 21, § 13, p. 418.

COCKBURN, C.J. I am of opinion that the appeal should be dismissed. The sale in question is a sale of growing crops; and two questions are presented: first, whether the document by which the sale was effected is a bill of sale; secondly, whether standing

(1) 1 C. P. D. 349.
(2) 1 Ex. 107; 16 L. J. (Ex.) 266.
(3) 2 M. D. & De G. 443.
(4) 1 C. M. & R. 177.
(5) 2 B. & B. 362.
(6) Law Rep. 7 H. L. 481.
(7) 5 B. & Ald. 88.
(8) 10 Ad. & E. 753.
(9) 6 East, 602.

1877

BRANTOM v. GRIFFITS.

crops, which were the subject-matter of this sale, are within the statute, so as to make it necessary to the validity of the bill of sale that it should have been registered. On the first question I am of opinion that this was a bill of sale. It is true that, in terms, it purports to be only an agreement to sell, but the obvious meaning of the parties is that the one actually sells and the other buys. If they had agreed to execute some other instrument afterwards, by which the property should be transferred, then the first document would not have been a bill of sale. But here there is an agreement to sell and purchase, amounting to a transfer in præsenti, which is a bill of sale.

Secondly, on the question whether growing crops are within the statute, I think they are not. The Bills of Sale Act, s. 1, relates to personal chattels; but, by the interpretation clause, s. 7, the expression "personal chattels" means "goods, furniture, fixtures, and other articles capable of complete transfer by delivery." I agree that that clause is susceptible of two readings, and it is possible that "capable of complete transfer by delivery" should be read with the words "other articles" only; but even assuming this to be so, the expression still shews what the intention of the statute was, and leads to the inference that it was intended that only such goods as are capable of present delivery should be included in the term "personal chattels." Such a construction would clearly meet the mischief intended to be remedied by the statute; it having been notoriously the habit of persons to obtain fictitious credit, which their real circumstances did not warrant, by retaining apparent possession of goods, the ownership of which they had parted with to others, but which appeared to be really their own by remaining in their possession,—a course of proceeding calculated to prejudice the honest creditor. "Personal chattels" is confined therefore, in my opinion, to goods capable of present delivery and removal. Now it is impossible that there can be present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser, and it is only when it reaches maturity that it can be removed; nor is it intended that it shall be removed till it is ripe. It is not like the case in which there is a secret transfer of moveable property which can be at once removed, and

the apparent possession of which is suffered to remain in a person who has parted with the ownership. In a popular and practical sense, growing crops are no more capable of removal than the land itself.

1877

BRANTOM v. GRIFFITS.

MELLISH, L.J., and BRAMWELL, J.A., concurred.

*Judgment affirmed.*

Solicitor for plaintiff: *Mote.*
Solicitor for defendants: *Selby.*

---

[IN THE COURT OF APPEAL.]

*Feb.* 3.

PURCELL *v.* SOWLER AND OTHERS.

*Libel—Privilege by Reason of the Occasion—Publication of Matters of Public Interest—Meetings of Poor-law Guardians—Ex parte Charges.*

The administration of the poor-laws, both by the government department and by the local authorities, including the conduct of the medical officers, is matter of public interest; but the publication of a report of proceedings at a meeting of poor-law guardians, at which ex parte charges of misconduct against the medical officer of the union were made, is not privileged by the occasion.

ACTION for libel.

The libel was contained in a report, published in a Manchester newspaper, by the defendants, the proprietors, of the proceedings at a meeting of the board of guardians for the Altrincham poor-law union, at which ex parte charges were made against the plaintiff, the medical officer of the union workhouse at Knutsford, of neglect in not attending the pauper patients when sent for.

At the trial it appeared that the charges were unfounded in fact, but it was admitted that the report was accurate and bonâ fide. A verdict was taken by consent for the plaintiff, with nominal damages and costs, judgment to be entered accordingly, with leave to move to enter judgment for the defendants, if the Court should be of opinion that the publication was privileged.

The Common Pleas Division refused the motion, ordering judgment to stand for the plaintiff. (1)

(1) 1 C. P. D. 781.

1877

PURCELL v. SOWLER.

The libel, &c., are set out at length in the report in the Court below.

The defendants appealed.

*J. Edwards, Q.C.*, for the defendants. The ground on which the judgment of the Common Pleas Division is based was that the conduct of a medical officer of a provincial poor-law union was not matter of general public interest. But surely the administration of the poor-laws, including medical relief to the paupers, and the conduct of the medical officer, is of public interest, however small or obscure the union may be. If the ground taken by the Court below were tenable, it would go to overrule all such cases as *Kelly* v. *Tinling* (1), *Davis* v. *Duncan* (2), and *Henwood* v. *Harrison*. (3) *Davison* v. *Duncan* (4) is to the contrary; but the principle of *Wason* v. *Walter* (5) has very much extended the doctrine of privilege in favour of publicity, on account of the public advantage derived from fair reports of all matters of general interest; and *Davison* v. *Duncan* (4) is inconsistent with the later cases already cited.

[COCKBURN, C.J. It is for the public advantage that all matters which may be openly discussed should be fairly communicated to all the public, as well as to those who happen to be present; but here an ex parte charge against a public officer in his absence, although of public interest, ought to be discussed in camerâ in the first instance.

MELLISH, L.J. Concede that what was said at the meeting was privileged, does that privilege extend beyond the room, or to communicating it to any one except those whose duty it was to investigate the charge?]

*C. Russell, Q.C.*, and *Bigham*, for the plaintiff. The argument attributed by the judgment of the Common Pleas Division to the counsel for the plaintiff is not the ground that was really submitted to the Court. It may be admitted that the plaintiff's position was such as to make it one of public interest, so that his conduct might be made the subject of comment on a proper occasion. But

(1) Law Rep. 1 Q. B. 699.
(2) Law Rep. 9 C. P. 396.
(3) Law Rep. 7 C. P. 606.
(4) 7 E. & B. 229; 26 L. J. (Q.B.) 104. 3 Jur. N.S. 614
(5) Law Rep. 4 Q. B. 73.

this was a preliminary discussion, no facts proved, but only an ex parte statement, and was a matter for further inquiry. Such an occasion, except perhaps it were in a court of law, is not privileged; or if it took place in parliament, according to the more recent decision in *Wason* v. *Walter* (1). But there is no analogy between the proceedings at a meeting of a board of guardians and judicial proceedings in a court of law or parliamentary proceedings. The meeting is not public; the public are generally admitted perhaps, but there is nothing in the statutes requiring that the public should be admitted. Lastly, this is not a case of comment, but a statement of facts, of charges of misconduct, which were not true.

[BRAMWELL, J.A., in *Popham* v. *Pickburn* (2) that distinction was taken and acted upon by the Court.]

*Davison* v. *Duncan* (3) is directly in point. Soon after that decision Lord Campbell, in 1858, brought in a bill to make the reports of the proceedings at certain public meetings privileged, but the House of Lords threw it out; and the debates shew that all the Law Lords thought that, without the protection of an Act of Parliament, the reports of such meetings would not be privileged: See Hansard's Debates, 3rd series, vol. cxlix. pp. 947–82. A passage from the judgment of Willes, J., in *Henwood* v. *Harrison* (4) was relied on for the defendants, where he says: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals." But that principle has no application to such a case as the present; it might be very different had the charges been established against the plaintiff, and the defendants had then published the statement without any comment, or with fair comments.

*J. Edwards, Q.C.*, in reply.

COCKBURN, C.J. I am of opinion that the judgment must be affirmed. But I am very anxious that it should be understood that

(1) Law Rep. 4 Q. B. 73.
(2) 7 H. & N. 891; 31 L. J. (Ex.) 133. 8 Jur NS 179
(3) 7 E. & B. 229; 26 L. J. (Q.B.) 104. 3 Jur NS. 614
(4) Law Rep. 7 C. P. 606, 622.

1877

PURCELL v. SOWLER.

my opinion is not based on the grounds on which the judgment of the Common Pleas Division appears to have been founded. As I understand it, that judgment proceeded on the ground that the subject-matter of the present action, which is an action of libel for a report in the defendants' newspaper of the proceedings of a board of guardians relating to the conduct of a medical officer of the poor-law union, was not a matter of public interest. In that view I am unable to concur. My reasons are very simple: It is impossible to doubt that the administration of the poor-law is a matter of national concern. The Court below seems to have distinguished between the general and the local administration of the poor-law, holding that the general administration was a matter of national concern, while the administration in a particular district was not. But it seems to me that whatever is matter of public concern when administered in one of the government departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern. The management of the poor and the administration of the poor-law in each local district are matters of public interest. In this management the medical attendance on the poor is matter of infinite moment, and consequently the conduct of a medical officer of the district may be of the greatest importance in that particular district, and so may concern the public in general. I therefore cannot concur with the Common Pleas Division in thinking that the matter to which the present libel relates was not a matter of public interest within the rule as to privileged publications.

The true question in the present case is whether, though the subject-matter was of general interest, the occasion on which the words were uttered was privileged, so as to protect the bonâ fide publication of the report. There is no doubt that the report of

proceedings in a court of justice, the administration of the law being of public interest and concern, if the report is fairly made, is privileged. Again, since *Wason* v. *Walter* (1), there can be no question that the proceedings of parliament may be published, although statements may have been made in the course of a debate prejudicially affecting the character of private individuals. But those cases form no precedent for the present. Many intermediate cases may be put. Take the meetings of the corporation of the City of London—the discussion at such meetings might involve strong observations on the conduct of particular individuals: so also as to the municipal councils of other cities or boroughs: so again as to the meetings of magistrates in quarter sessions, not as courts of justice, but for transacting the business of their county. In all these cases I should be sorry to lay down as law that the proceedings of such meetings may not be fully reported, although the character of private individuals may be incidentally attacked. But it is unnecessary, for the decision of the present case, to lay down any such rule; and I wish to be understood as by no means saying that the proceedings of different bodies to whom part of the administration of the public business of the country is committed would not be matter of general discussion and publication. In these instances publicity may be essential to good administration. But here we have to deal with the case of a body of very limited jurisdiction, and as to which it cannot be asserted that publicity is essentially necessary or usual. It is quite clear that the meetings of poor-law guardians are not necessarily public: they have full right to close their doors, and although the public are generally admitted, yet, when charges are to be made affecting private character, the more proper course would be to close the doors and hold the discussion in camerâ. In the present case that course unfortunately was not adopted; the reporter of a newspaper was admitted, and he communicated what had been said to the newspaper, and so the libel was published. Was the occasion privileged? There is no authority for holding it to be so, and I think it was not. Suppose a meeting of the poor-law board in London (which sits with closed doors) for the discussion of matter of a similar nature to the present, and some one thought proper to send a report of it

(1) Law Rep. 4 Q. B. 73.

1877

PURCELL v. SOWLER.

to a newspaper, it is quite clear that an action would lie at the suit of the person whose character was so assailed by the publication of the proceedings. The same may be said of an inquiry at the Horse Guards or Admiralty. A preliminary inquiry, which might be and ought to be carried on with closed doors, is not the proper subject of a public report. This is one of the cases in which the board of guardians are not called upon to make their proceedings public. They were clearly not bound to do so, and they ought to exercise proper discretion as to closing their doors. It may be said that although a board of guardians have a discretion to close their doors, if they choose to admit the public, what passes should be open to publication. But there is no authority for this position; and the effect of it would be that an unwise exercise of the discretion might expose a man to a publication otherwise libellous. If the guardians choose to open their doors when they ought to close them, and a reporter is admitted, the editor or proprietor of the newspaper ought to exercise his discretion, and not publish libellous matter, which may be justified by the occasion so far as the speaker is concerned, but not so far as affects publication. Therefore, without encroaching on the general principle which is now established as applicable to other public bodies, I do not think that principle applicable to the present case. The judgment for the plaintiff must therefore be affirmed.

MELLISH, L.J. I am of the same opinion. We are asked to extend the law of privilege as to the report of proceedings of a public body to an extent beyond what it has as yet been carried. In Lord Campbell's time it was supposed that the privilege only extended to the proceedings in a court of law. A report of such proceedings has always been held privileged, because all her Majesty's subjects have a right to be present, and there would, therefore, be nothing wrong in putting the rest of the public in the position of those who were actually present. The privilege has been extended to the publication of debates in Parliament, and properly extended, as they stand on the same principle as the proceedings in courts of law. There is no doubt this distinction: that as to courts of law the public have a right to be present, but they are only admitted to the debates in either House of Parlia-

1877

PURCELL v. SOWLER.

ment when the House chooses to permit them to be present. The House has a discretion, but when the debates are held in public, it is clear that a newspaper ought not to be held to commit an offence by putting those who were not present in the same position as those who were. It is argued that this privilege ought to be extended as to a variety of other public bodies. I express no decided opinion, and I desire, with the Lord Chief Justice, to be understood as expressing no opinion; but at the same time I am clearly of opinion that the privilege ought not to be extended to such a case as the present. A board of guardians have a discretion whether or not they will admit the public to their meetings; and whether they choose to exclude or choose to admit, the public have no right to complain. But I cannot think that the courts of law are to be bound by the mode in which the guardians exercise their discretion in admitting or excluding strangers. Although they admit the public on an occasion when ex parte charges are made against a public officer, which may affect his character and injure his private rights, it is most material that there should be no further publication; there is no reason why the charges should be made public before the person charged has been told of the charges, and has had an opportunity of meeting them; and I cannot see any inconvenience in holding that the publication is not privileged; in holding otherwise we should be depriving the individual of his rights without any commensurate advantage. The law on the subject of privilege is clearly defined by the authorities. Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges. If one of the guardians had met a person not a ratepayer or parishioner, and had told him the charge against the plaintiff, surely he would have been liable to an action of slander. I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained. If the neglect charged against the plaintiff had been proved, then fair comments on his conduct might have been justified. But that is a very different thing from publishing ex parte statements, which not only are not proved but turn out to be unfounded in fact. I am, therefore, clearly of opinion that the occa-

1877

PURCELL v. SCWLER.

sion of the publication was not privileged, and that the judgment for the plaintiff ought to be affirmed.

BAGGALLAY, J.A. I am of the same opinion, and will add only a few words. I cannot draw any distinction between the present case and some of those cited for the plaintiff. For instance, the facts of *Popham* v. *Pickburn* (1) are very similar to the present. Here statements are made to a meeting of the guardians by the master of the workhouse, charging the plaintiff, the medical officer, with misconduct; in *Popham* v. *Pickburn* (1) there was a report to the vestry board by their medical officers that a medical man had given false certificates, it was held that the publication was not privileged. The same principle must apply in the present case. Nor does it appear to me that the decision in *Wason* v. *Walter* (2) in any way conflicts with the previous decisions. The reports of debates in parliament were held privileged on the same principle as reports of the proceedings in courts of law; viz., the advantage of general publicity. It is not material to consider whether the privilege ought to be extended; I am satisfied that it ought not to be extended to such a case as the present, and that there is nothing in *Wason* v. *Walter* (2) inconsistent with our decision of the present case.

BRAMWELL, J.A. I am of the same opinion, and I desire to say why. It is not because I am insensible to the advantage of giving full effect to the privileges of the public press. The world is governed by public opinion; and public opinion is formed chiefly by means of the public press, and of the periodical public press especially. But I think law and reason and good sense are against the privilege extending to the present case. I cannot, as the Lord Chief Justice has said, agree with the reasons given by the Common Pleas Division. If this had been a discussion on the plaintiff's conduct, the facts not being in controversy, the matter was a subject of such general public interest as would have given a right to comment upon it; and fair and bonâ fide comments would have been justified. But that is not this case. This

(1) 7 H. & N. 891; 31 L. J. (Ex.) 133. (2) Law Rep. 4 Q. B. 73.

8 Jur. N.S. 179

is a case in which the defendants have published a true and bonâ fide report of a statement of facts charged against the plaintiff, but a statement which shews that the person making it was making it in the absence of the plaintiff and without any knowledge on the part of the person making it. There was no duty to report such ex parte proceedings; if the guardians did not exclude strangers, as they might well have done, the reporter ought to have taken care what he was about, and not to have reported libellous matter; and the defendants, having published it, must take the consequences. Serious and grievous harm has resulted to the plaintiff, whose character has been assailed, and for no public good. What is the law? Surely that such a publication is not privileged. Mr. Edwards, indeed, admitted that the cases were against him; but he said the law had been modified since, and he relied on *Wason* v. *Walter* (1), but that case is clearly distinguishable from the present, for the reasons already given. The judgment must be affirmed.

*Judgment affirmed.*

Solicitor for plaintiff: *C. W. Dommett, for J. R. Barling, Manchester.*

Solicitors for defendants: *Johnson & Weatheralls, for Stevenson, Lycett, & Co., Manchester.*

(1) Law Rep. 4 Q. B. 73.

1877
*Feb.* 13.

## JOHNSON *v.* THE CRÉDIT LYONNAIS.

*Agent or Factor intrusted otherwise than for Sale or Dealing—Factors Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39.*

The plaintiff, a tobacco-manufacturer at Bolton, bought of H., a commission-merchant and agent, and also a dealer in tobacco, 50 hhds. of tobacco then lying in bond in the name of H. in the L. Dock. The price was paid, but the tobacco was to remain in the dock, to be forwarded to the plaintiff as he might want it for the purpose of his business, with an understanding that the tobacco was to be cleared by H. and dispatched to Bolton free of any charge for commission, or, should the plaintiff sell any portion of it, to be delivered to his vendees; the plaintiff remitting to H. the amount of duty and dock charges. This arrangement was one so usual in the tobacco trade that any other arrangement was exceptional. For this purpose the tobacco was allowed to remain in the name of H. in the dock books, and he retained the dock-warrants. In his own books, however, the transaction was entered as a sale to the plaintiff.

H., representing the tobacco to be his own property, pledged it with the defendants as security for a loan, handing them the dock-warrants; and he caused the tobacco to be transferred into their names in the dock books, the defendants having no knowledge that the plaintiff was interested in it. H. shortly afterwards absconded, and was adjudicated bankrupt. The plaintiff demanded the tobacco of the defendants, but they claimed to retain it, either on the ground that the plaintiff had armed H. with an ostensible authority to deal with the goods as his own, or that he was intrusted with the tobacco or the documents of title with authority to pledge or sell, within the Factors Acts:—

*Held*, by Denman, J., on motion for judgment, the judge having power to draw inferences of fact, that H. was not intrusted with the tobacco as factor or agent for sale, but only to clear and forward it to the plaintiff or to his vendees as and when required, and consequently that he had no authority to sell or to pledge it.

*Held*, also, that, looking at the usage of the trade, the plaintiff had not given any ostensible authority to H. to pledge the tobacco.

CLAIM. 1. On or about the 3rd of December, 1875, the plaintiff, who is a tobacco-manufacturer, bought of one J. A. Hofmann and became the absolute owner and entitled to the possession of D G, 50 hhds. of tobacco then lying in bond at the London and St. Katharine's Dock.

2. Afterwards Hofmann, without any authority from and in fraud of the plaintiff, affected to transfer the tobacco to the order of the defendants, and delivered to the defendants the dock-warrant or other receipt issued by the dock company in respect of the goods, or the defendants otherwise became possessed of the

dock-warrant and tobacco in wrong of the plaintiff. Hofmann afterwards absconded.

3. The plaintiff applied to the dock company for delivery of his tobacco; but they, following the ordinary course of business, refused to comply with his request until the dock-warrant should be produced to them duly signed or indorsed in his the plaintiff's favour.

4. Thereupon the plaintiff applied to the defendants for the dock-warrant and for delivery of his tobacco, but they refused to part with or deliver the same to him, and claimed and still claim to retain the same as security for advances alleged to have been made by them to Hofmann at the time of the delivery to them of the dock-warrant, as in the second paragraph mentioned.

DEFENCE. 1. The defendants do not admit that on or about the 3rd of December, 1875, or at any other time, the plaintiff bought of Hofmann or became the absolute owner and entitled to the possession of the tobacco.

2. The defendants do not admit that the transfer of the tobacco and delivery of the said dock-warrant or dock-warrants by Hofmann to them was without any authority from or in fraud or wrong of the plaintiff.

3. The defendants claim to be entitled to retain the tobacco and the proceeds thereof in satisfaction or part satisfaction of moneys advanced by them, and they say that the tobacco was transferred and delivered to them under the following circumstances:—

4. On the 24th of January, 1876, Hofmann, who was then a commission-merchant and factor carrying on business in London under the name of J. A. Hofmann & Co., and who was also a large dealer in tobacco, applied to the defendants for an advance of 3500*l.* on the security of a pledge of tobacco stated by him to be his property, and lying at the London and St. Katharine's Dock, and for which he held dock-warrants in his own name. He produced a list and valuation of the tobacco, being the memorandum of the 24th of January, 1876, hereinafter set forth, and in that list were included the 50 hhds. of tobacco, erroneously described in the statement of claim as marked D G, but really marked D Q. The whole of the tobacco in that list was valued at 4200*l.*, but

1877

JOHNSON v. CRÉDIT LYONNAIS.

the valuation of the 50 hhds. was only 1250*l.* or thereabouts. Hofmann then handed the defendants the list and valuation, of which the following is a copy:—

MEMORANDUM.

From J. A. Hofmann & Co., 15 Gresham Street, London, to Crédit Lyonnais, 29 Lombard Street. 24th January, 1876.

| | | | Cwts. | qrs. | lbs. | | |
|---|---|---|---|---|---|---|---|
| D Q | 1441/50 .. 10 hhds. | .. .. .. | 63 | 0 | 22 | | |
| | 1451/60 .. 10 „ | .. .. .. | 72 | 1 | 21 | | |
| | 1461/70 .. 10 „ | ex *Denmark* @ New | 66 | 2 | 3 | | |
| | 1471/80 .. 10 „ | York .. .. | 69 | 2 | 12 | | |
| | 1481/90 .. 10 „ | .. .. .. | 71 | 3 | 4 | @ 8*d.* | £1272 11 0 |

[Then followed an enumeration of the tobaccos, the value of the whole being stated at 4200*l.*]

5. The defendants consented to make the advance, the terms of which were expressed in the following letter from them to Hofmann:—

29 Mincing Lane. 24 January, 1876.

Messrs. J. A. Hofmann & Co.

Gentlemen,—By this we beg to acknowledge receipt of the following warrants for tobacco:—

5 warrants, 50 hhds. ex *Denmark*.

[Here followed an enumeration of other 22 warrants.]

27 warrants valued as per your statement at 4200*l.*, against which we handed you our cheque 3000*l.*, being part of 3500*l.* that we have agreed to lend you for two months on deposit of warrants for tobacco of a sufficient value. Interest to be charged at 5 per cent. per annum, plus a commission of ½ per cent. It is understood that the warrants will be at your disposal for the purpose of exchanging them for others, and that all valuations will be subject to our approval.

(signed) A. Bideleux.

P.S. In regard to the insurance, please hand us the policies at your convenience to-morrow.

The 50 hhds. ex *Denmark* mentioned in the foregoing letter are the 50 hhds. marked D Q.

6. The defendants accordingly advanced to Hofmann 3000*l.* on the 24th of January, 1876; and on the 9th of February, 1876, they advanced to Hofmann on the same terms and under the same circumstances as in the advance of 3000*l.*, the further sum of 900*l.* on the security of the tobacco already pledged and of 50 other hhds. of tobacco then pledged with the defendants by Hofmann, and valued at 1280*l.*; and on the 19th of February, 1876, they ad-

vanced to Hofmann on the same terms and under the same circumstances the further sum of 800*l.* on the security of the previous pledges and of certain other tobacco then pledged with the defendants by Hofmann, and valued at 1680*l.* Hofmann paid to the defendants on account of the said pledges sums of money amounting to 700*l.*, and received back from the defendants tobacco of greater value than the amount so paid by him; and at the time when Hofmann absconded, as mentioned in the statement of claim, he was indebted and still is indebted to the defendants in respect of the advances made on the security of the said pledges in the sum of 4000*l.*, exclusive of interest, commission, and insurance.

7. Hofmann on the 24th of January, 1876, transferred and delivered to the defendants five dock-warrants for the 50 hhds. of tobacco, each warrant being for 10 hhds., in the name of Hofmann. At the time when the advances were made on the security of the pledge, the defendants believed the representation made to them by Hofmann that the 50 hhds. D Q were his property, and had no knowledge or means of knowledge of the plaintiff's alleged claim to them.

8. The defendants delivered up to the dock company the five warrants for the 50 hhds. D Q to be cancelled, and took instead thereof fresh warrants in their own names. The five warrants in the name of Hofmann were so delivered up and cancelled before any notice to the defendants and before any knowledge by the defendants that the 50 hhds. D Q were claimed by the plaintiff.

9. If the plaintiff was, as alleged by him, the true owner of the 50 hhds. of tobacco at the time when the pledge thereof was made to the defendants, Hofmann was the plaintiff's factor or agent intrusted with the possession of the goods and of the documents of title thereto.

10. The plaintiff at the date of the pledge to the defendants by Hofmann had given him actual or ostensible authority to deal with the goods as owner thereof or as an agent entitled to sell or pledge the same.

11. Under the circumstances before mentioned, the defendants admit that the plaintiff has applied to the dock company and to the defendants for the delivery to the plaintiff of the dock-warrants and tobacco, and that such delivery has been refused.

1877

JOHNSON v. CRÉDIT LYONNAIS.

REPLY. 1. The plaintiff joins issue on the defendants' statement of defence.

2. The plaintiff will in case of need rely upon a custom in the tobacco trade whereby manufacturers who purchase tobacco in bond leave the goods in the possession of the selling brokers or vendors until such time as the goods are actually required for manufacturing purposes.

The case was argued, on motion for judgment, before Denman, J., on the 31st of January, 1877. The facts and arguments are fully stated in the judgment.

*Thesiger, Q.C.* (*Bigham* with him), for the plaintiff, referred to *M'Combie* v. *Davies* (1), *Pickering* v. *Busk* (2), *Fuentes* v. *Montes* (3), and *Cole* v. *North Western Bank.* (4)

*Benjamin, Q.C.* (*Watkin Williams, Q.C.*, and *Woolf*, with him), commented on the Factors Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, and upon the cases cited for the plaintiff, and referred to *Boyson* v. *Coles* (5), *Monk* v. *Whittenbury* (6), *Dyer* v. *Pearson* (7), *Vickers* v. *Hertz* (8), and *Goodwin* v. *Robarts.* (9)

*Cur. adv. vult.*

Feb. 13. DENMAN, J. This was an action tried before me at Westminster on the 25th of January last. The facts were taken entirely by admission, and I heard the arguments on the motion for judgment on the 31st of January. The action was for 1256*l.* 18*s.* 8*d.*, the value of 50 hhds. of tobacco belonging to the plaintiff, and pledged with the defendants by one Hofmann on the 24th of January, 1876, under the circumstances stated by admission at the trial. The plaintiffs also contended that, if not entitled to the whole value, they might be entitled to an account: but no question now arises on this head, as it was agreed that any such questions should stand over to be decided, if necessary, hereafter. The admissions made at the trial were so ably and briefly stated by

(1) 6 East, 538.
(2) 15 East, 38.
(3) Law Rep. 3 C. P. 268; in error, Law Rep. 4 C. P. 93.
(4) Law Rep. 9 C. P. 470; in error, Law Rep. 10 C. P. 354.
(5) 6 M. & S. 14.
(6) 2 B. & Ad. 484.
(7) 3 B. & C. 38.
(8) Law Rep. 2 H. L., Sc. 113.
(9) 1 App. Cas. 476.

counsel on both sides as to make it superfluous to do more than to read in most cases the very words of the admissions as they appear upon my notes (in some cases, however, omitting some unnecessary details), and after stating what conclusions of fact I draw under the power given by agreement at the trial, to explain the grounds of the judgment I have arrived at.

It appears that for some years down to March, 1876, one Hofmann (whose acts were relied upon under the circumstances by the defendants as giving them a title to the goods) carried on business in London, selling goods of various descriptions,—silks, velvets, and ribbons, as well as tobaccos,—under the style of J. A. Hofmann & Co. The tobacco business was of two kinds, partly receiving consignments from foreign houses on the continent, who drew on J. A. Hofmann & Co. for the value of goods less commission del credere and agency, partly receiving tobacco owned by Hofmann himself and his brother from America. The brother was not a partner in J. A. Hofmann & Co. The following was the course of business as regards purchases of tobacco:—The tobacco on arrival being consigned to Hofmann & Co. would be placed in bond in the warehouses at the docks, standing in the name of J. A. Hofmann & Co. Their agent, Kuschke, would then take samples to the large manufacturing houses, who would make purchases from time to time in quantities beyond their immediate requirements. Kuschke would then agree with the purchasers *to clear the goods when required*, generally charging 1s. per bale for his services. In the case of the plaintiff no commission was charged, in consideration of the distance at which he lived (viz. at Bolton) and the expense of carriage. Owing to the large proportion which the duty bears to the value of tobacco, a practice has arisen of leaving the goods in the warehouse *in the name of the seller*, which is not invariable, but the contrary is the exception. The plaintiff and Hofmann had for many years dealt with one another through Kuschke as above described, Kuschke selling goods from time to time for manufacture, and sending an invoice for the amount of the purchase-money, and the plaintiff usually paying at once and obtaining the usual discount, and from time to time, as he required the tobacco, sending to Hofmann the amount of duty and dock-dues in respect of the part he wished cleared,

1877

JOHNSON v. CRÉDIT LYONNAIS.

which Hofmann would clear and forward to Bolton. The tobacco would sometimes lie at the docks uncleared for a year or more. The plaintiff was not aware of what happened as regards the entries in the dock books. In fact the tobacco was left there in Hofmann's name, but entered in Hofmann's books as a sale to the plaintiff.

As regards the particular transaction in question in the cause, the facts admitted were as follows:—On the 3rd of December, 1875, Kuschke called on the plaintiff with samples of the 50 hhds. of tobacco in question, being Maryland tobacco, the property of Hofmann and his brother (who resided at Algiers). Kuschke offered it to the plaintiff as suitable to his trade at 8*d.* per lb., stating that *if there was too much he could sell it at a profit.* The plaintiff, after examining the samples, agreed to take the 50 hhds., and said *he would work them himself, but, if he should alter his mind, he would let Kuschke know,* adding "If you have any inquiries for Marylands, let me know."

On Kuschke's return to town, an invoice was sent, dated the 3rd of December, 1875, headed "Charles Johnson, bought of J. A. Hofmann & Co., 50 hhds. of Marylands" (and other tobacco). At the foot of the invoice was written "In bond. Two months prompt, or cash less 5 per cent. per annum for three months." It was agreed that 1266*l.* 18*s.* 8*d.* was the price of the 50 hhds. in question, and that the whole of that price was paid by the 31st of December, 1875.

On the 9th of March, 1876, Hofmann absconded. On the 15th a petition was filed, and he was afterwards adjudged bankrupt on an adjudication founded on the absconding as the act of bankruptcy. At the time of the bankruptcy a large quantity of tobacco, besides the tobacco in question purchased by the plaintiff of Hofmann, some of it Marylands, remained undelivered, most of which was still standing in Hofmann's name at the bonded warehouses.

By an order of the Court of Bankruptcy this other tobacco was declared to be the plaintiff's as against the trustee (i.e. not to come within the reputed ownership clauses of the Bankrupt Act); but the defendants were no parties to that decision. It was discovered by the plaintiff that the 50 hhds. in question had before the bankruptcy been pledged by Hofmann to the defendants as

security for advances made by them to him personally, together with a large quantity of tobacco not the plaintiff's. A portion of 42 hhds. of the plaintiff's tobacco had also been pledged to one Blumenthal, which formed the subject of an action tried before Field, J., in which judgment, after argument, was given for the plaintiff.

The defendants' counsel, having admitted all the above facts, proposed to add certain facts set forth in his statement of defence, which were admitted as follows:—The defendants claimed to be entitled to retain the tobacco and the proceeds thereof in satisfaction or part satisfaction of moneys advanced by them, and alleged that the tobacco was transferred and delivered to them under the following circumstances:—On the 24th of January, 1876, Hofmann, who was then a commission-merchant and factor carrying on business in London under the name of J. A. Hofmann & Co., and who was also a large dealer in tobacco, applied to the defendants for an advance of 3500*l.* on the security of a pledge of tobacco stated by him to be his property and lying at the London and St. Katharine's Dock, and for which he held dock-warrants in his own name. He produced a list and valuation of the tobacco, being the memorandum of the 24th of January, 1876, hereinafter set forth, and in the list were included the 50 hhds. of tobacco erroneously described in the statement of claim as marked D G, but really marked D Q. The whole of the tobacco in the list was valued at 4200*l.*, but the valuation of the 50 hhds. was only 1250*l.* or thereabouts. Hofmann then handed the defendants the list and valuation, of which the following is a copy:—"Memorandum. From J. A. Hofman and Co. to Crédit Lyonnais. 24th January, 1876." [Then followed an enumeration of the 50 hhds. and other tobaccos.] The defendants consented to make the advance, the terms of which were expressed in the following letter from them to Hofmann,—

"29 Mincing Lane, Jan. 24, 1876.

"Messrs. J. A. Hofmann & Co.

"Gentlemen,—By this we beg to acknowledge receipt of the following warrants for tobacco,—

"5 warrants, 50 hhds. ex *Denmark*.

[Here followed an enumeration of other tobaccos.]

1877

JOHNSON v. CRÉDIT LYONNAIS.

27 warrants, valued as per your statement at 4200*l.*, against which we handed you our cheque 3000*l.*, being part of 3500*l.* that we have agreed to lend you for two months on deposit of warrants for tobacco of a sufficient value. Interest to be charged at 5 per cent. per annum, plus a commission of ½ per cent. It is understood that the warrants will be at your disposal for the purpose of exchanging them for others, and that all valuations will be subject to our approval."

The 50 hhds. ex *Denmark* mentioned in the foregoing letter were the 50 hhds. marked D Q. The defendants accordingly advanced to Hofmann 3000*l.* on the 24th of January, 1876; and on the 9th of February, 1876, they advanced to Hofmann on the same terms and under the same circumstances as in the advance of 3000*l.* the further sum of 900*l.* on the security of the tobacco already pledged and of 50 other hogsheads of tobacco then pledged with the defendants by Hofmann and valued at 1280*l.*; and on the 19th of February, 1876, they advanced to Hofmann on the same terms and under the same circumstances the further sum of 800*l.* on the security of the previous pledges and of certain other tobacco then pledged with the defendants by Hofmann, and valued at 1680*l.* Hofmann paid to the defendants on account of the said pledges sums of money amounting to 700*l.*, and received back from the defendants tobacco of greater value than the amount so paid by him; and at the time when Hofmann absconded he was indebted, and still is indebted, to the defendants in respect of the advances made on the security of the said pledges in the sum of 4000*l.*, exclusive of interest, commission, and insurance. Hofmann on the 24th of January, 1876, transferred and delivered to the defendants five dock-warrants for the 50 hhds. of tobacco, each warrant being for ten hogsheads, in the name of Hofmann. At the time when the advances were made on the security of the pledge, the defendants believed the representations made to them by Hofmann that the 50 hhds. D Q were his property, and had no knowledge of the plaintiff's claim to them.

On the morning of the 14th of March, 1876, Hofmann had absconded, and it was generally known that that was the fact, and that his affairs were desperate. On the same day, and with knowledge of that fact, the defendants delivered up to the dock com-

pany the five warrants for the 50 hhds. of tobacco D Q to be cancelled, and the tobacco was transferred into their name in the dock books on the 15th of March. The five warrants in the name of Hofmann were so delivered up and cancelled, and the tobacco so transferred as aforesaid, before any notice to the defendants and before any knowledge by the defendants that the 50 hhds. D Q were claimed by the plaintiff. According to the practice of the dock company, if the defendants after the transfer in the dock book had demanded fresh warrants, they would have received them as a matter of course.

On the 14th of March, 1876, the defendants wrote Hofmann a letter requesting him to forward them the dock samples of "the following tobacco, warrants for which we hold as security," and adding,—"Please note that the insurance against fire ceases on the 24th instant, and that we shall re-insure the tobacco on that date for whose account it may concern." The first five items mentioned in that letter are the 50 hhds. in dispute. This letter was written under the same circumstances as regards knowledge as stated above with regard to the delivery up of the warrants.

The interrogatories administered by the defendants to the plaintiff, and the answers thereto, were relied upon by the counsel for the defendants. I will state what I consider their effect to be in the course of what I have to say presently.

Such being the materials upon which my judgment is to be based, I will now state generally the contentions of the plaintiff and defendants respectively in the very able arguments they addressed to me.

The plaintiff's counsel contended, in the first place, that the case was identical with that of *Johnson* v. *Blumenthal*, and that it ought to be governed by the decision of Field, J., in that case.

To this contention two answers were given. First, as to the defence, paragraph 10, viz. that "Hofmann at the time of the pledge had received from the plaintiff actual or ostensible authority to deal with the goods as owner or as an agent entitled to sell or pledge them," it was said, and truly, that, in the case of *Johnson* v. *Blumenthal*, this question was disposed of by an express finding of the jury. It was also urged that the answers to interrogato-

1877

JOHNSON v. CRÉDIT LYONNAIS.

ries which were in evidence in the present case were not there in evidence, and constituted a material difference in the circumstances of the two cases. Secondly, as to the allegation that at the time of the pledge Hofmann was the plaintiff's factor or agent intrusted with the possession of the goods and of the documents of title thereto (paragraph 9), it was said that there was no such allegation upon the pleadings in the former case, and therefore the question could not have been decided upon the Factors Acts.

Under the circumstances, I think it better to give my judgment upon both questions upon the facts of the present case, without assuming that *Johnson* v. *Blumenthal* is so identical as to dispose of this case, though it may be found, when that case comes to be reported, that it is undistinguishable. If I had been able to obtain any report of the facts and judgment in that case, and found it to be undistinguishable, I should have declined to hear any argument, and decided in favour of the plaintiff, leaving the defendant to appeal; for, I am of opinion that the Appellate Jurisdiction Act, 1876 (1), would be seriously crippled in its application, if single judges were not to hold themselves bound by the decisions of other single judges on the same questions, to the same extent as the superior Courts were in the habit of doing before the Judicature Act.

It having been admitted upon the trial, by the withdrawal of the two first paragraphs of the statement of defence, that the plaintiff had about December the 3rd, 1875, become the absolute owner of the 50 hhds., and that the transfer and delivery of the tobacco and documents by Hofmann to the defendants was without any authority from and in fraud of the plaintiff, this case starts with the onus strongly upon the defendants to make out either of their defences.

In support of the defence set up in the 10th paragraph, the defendants' counsel relied strongly on the plaintiff's answers to the second and third interrogatories. Those questions and answers were as follows:—

Q. Did not the said J. A. Hofmann, at the time of the purchase by you in the statement of claim alleged, inform you, or were you not aware, that Hofmann

(1) 39 & 40 Vict. c. 59.

had in his possession five dock-warrants dated the 22nd of November, 1875, for the 50 hhds. of tobacco the subject of this action, in his own name, whereby the said tobacco was deliverable to Hofmann or his assigns by indorsement on the said warrants, or how otherwise?

A. The said J. A. Hofmann did not at the time of the purchase by me in the statement of claim alleged, or at any other time, inform me, nor was I aware, that Hofmann had in his possession the five warrants in the second interrogatory mentioned, or either of them, in his own name, whereby the said tobacco was deliverable to Hofmann or his assigns by indorsements on the said warrants: but, when I bought and paid for the 50 hhds. of tobacco in the third interrogatory mentioned, I assumed and believed that the same (and the warrants, if any, representing them) were in the possession and control of Hofmann; and I so believed on the 24th of January, 1876.

Q. Did not the said 50 hhds. and the said dock-warrants respectively to your knowledge and with your consent remain in the name and possession or under the control of Hofmann? and were they not to your knowledge and with your consent in his name and possession or under his control on the 24th of January, 1876, or how otherwise?

A. I left the said tobaccos in the possession of Hofmann as my agent to forward the same to me as and when I might require them or any of them for the purposes of my trade, or to forward them to any person to whom they might be sold: but I had no actual knowledge as to whether he had such possession and control, and, except as herein appears, I did not consent to his having possession and control thereof.

Coupling these questions and answers with the other facts admitted in the case, I am not able to draw any inferences at all unfavourable to the plaintiff beyond what are to be drawn from the fact that, having bought from Hofmann and paid for the tobacco in question by the 31st of December, 1875, he left the tobacco in bond in Hofmann's name, and assumed that Hofmann still retained possession and control of any documents representing the tobacco, as his agent *for the purpose of forwarding the tobacco* to him as he might require it for the purposes of his trade, or to forward it to any persons to whom the plaintiff might sell the tobacco. I see nothing in these answers to induce me to qualify any of the admissions made with regard to the ordinary dealings between the plaintiff and Hofmann, or with regard to the particular transaction.

The defendant's counsel also relied upon the conversation between Kuschke and the plaintiff on the 3rd of December, 1875: but it appears to me that no inference can be drawn from that conversation, in the absence of any evidence that the plaintiff ever re-opened the transaction, inconsistent with the application of the

1877

JOHNSON v. CRÉDIT LYONNAIS.

general course of dealing between the parties, according to which this was clearly a complete purchase of the tobacco by the plaintiff from Hofmann at least as early as the 31st of December, 1875; the only authority left in Hofmann being to clear the goods from time to time as the plaintiff might require them, and forward them to him or his purchasers.

Under these circumstances, the defendants' counsel contended that the plaintiff cannot succeed, because, having armed Hofmann with the indicia of property in the goods, and so enabled him to commit a fraud, he has disentitled himself to recover against a bonâ fide pledgee of the goods; and they cited several cases in support of this contention. Amongst others, *Boyson* v. *Coles* (1) was relied upon, for the question there left to the jury by Lord Ellenborough: but the decision of that case appears to me to be rather an authority for the plaintiff than for the defendants. The decision was in favour of the plaintiff, and the Court held that the pawnee could not obtain a better title than the pawner, unless the real owner had armed the latter with some document which necessarily indicated an intention to transfer the actual property as distinguished from the possession of the goods. In the present case, looking at the usage in the trade and the previous relations between the parties, as well as the particular transaction itself, I am of opinion that neither in fact nor in law did the plaintiff arm Hofmann with the indicia of property, in the sense in which those words are used in the cases which were cited. Relying upon the honesty of Hofmann, he left the goods which he had bought of him in bond, trusting to Hofmann to forward them to him from time to time as they might be required by him, and for that reason only not insisting on the possession of any warrants or a transfer in the books of the company. And this was done in accordance with a usage so prevalent in the trade that the contrary is admitted to be "the exception."

Independently of the Factors Acts, the mere possession of the dock-warrants is nowhere made conclusive as to the application of the rule acted upon in *Pickering* v. *Busk* (2): but it is for the jury to say whether the plaintiff has so conducted himself as to have lost the right to follow his own goods into the hands of the

(1) 6 M. & S. 14. (2) 15 East, 38.

purchaser or pledgee. Under the facts stated in the present case, I should not as a juryman think that the plaintiff had so conducted himself: and I must therefore hold that the defendants are not entitled to succeed upon the ground stated in the 10th paragraph of their defence.

With regard to the 9th paragraph of the defence, setting up the sale to the defendants as one made by Hofmann as the plaintiff's "factor or agent intrusted with the possession of the goods and the documents of title thereto," I also think the defendants are not entitled to succeed, but that the case is governed by the authority of *Cole* v. *North Western Bank*. (1) In fact, I think it is a stronger case for the plaintiff than that was. The defendants upon this point also relied upon the answers to interrogatories Nos. 4 and 5 (2); but I can find nothing in them which was not already stated in the admissions made. Upon those admissions, drawing such inferences as appear to me to be correct, the positions of Hofmann and the plaintiff respectively seem to be these: Hofmann was a factor and commission agent in London; but he was also a large tobacco merchant on his own account. So far

(1) Law Rep. 9 C. P. 470; on appeal, Law Rep. 10 C. P. 354.

(2) The 4th and 5th interrogatories and the answers thereto were as follows:—

Q. Was not Hofmann intrusted by you with the possession of the said 50 hhds. and the said dock-warrants, or did not you allow him to retain the possession of the same *as your factor or agent*? State fully the circumstances under which he was so intrusted by you or authorized to retain possession and the purpose or object thereof; and would not Hofmann have been entitled to receive from you some and what commission as your factor or agent in respect of his clearing the tobacco or some part thereof from the customs or paying the duties thereon from time to time, or how otherwise?

A. In answer to the fourth interrogatory, I refer to my last preceding answer. Hofmann would not have been entitled to any commission in respect of clearing the goods at the customs or making payments on account of duty or forwarding the tobacco, he having agreed with me some time previously, on my complaining that I did not like buying London tobacco, on account of the excessive carriage to Bolton, that he would not charge me the usual commission of 1s. per package for clearing the goods.

Q. Was not the said tobacco insured by Hofmann, and to your knowledge in his own name? and did he not pay the premium or premiums in respect of such insurance, or how otherwise?

A. I did not instruct Hofmann to insure the tobacco, and I do not know that he did insure it. Hofmann did not that I know of charge me with the premiums; but whether he himself paid them or not I cannot say. I do not know in whose name the tobacco was insured, if at all.

1877.

JOHNSON v. CRÉDIT LYONNAIS.

as the transaction in question was concerned, and generally in his transactions with the plaintiff, he was a mere vendor to the plaintiff who received cash for discount on each transaction, but who was, in accordance with the practice of the trade (not invariable, but most usual), left in the possession of the goods in bond, so as to avoid premature payment of the duty; undertaking (with other customers for a commission, but for the plaintiff, in consideration of his distant residence and the expense of carriage, for nothing) to clear the goods for the plaintiff or other purchasers, and forward them to him or them, or his or their customers, as required. There was nothing in the case to shew the plaintiff that Hofmann treated the goods as in any other sense at his disposal. Nor was there anything as regards the goods in question to shew the plaintiff that Hofmann retained, or supposed that he retained, any interest in them, or to authorize Hofmann in so supposing. Under these circumstances, the defendants on the 24th of January, 1876, advanced to Hofmann 3500*l.* on the security of these amongst other goods, and he transferred to them the dock-warrants relating to them.

I heard a very able argument by Mr. Woolf on behalf of the defendants to the effect that it was not necessary, in order to validate a pledge by a factor, that he should be a factor intrusted to sell; and he raised again and discussed many questions of great nicety which have arisen upon the construction of the Factors Acts: but the result of his argument was to satisfy my mind that the only real question in this case was rather a question of fact than one of law, viz. in what capacity was Hofmann intrusted by the plaintiff? Upon this question I have no doubt whatever that the proper answer to give upon the facts admitted and proved is, that the only capacity in which Hofmann had any possession of the goods after the 31st of December, 1875, was that of a paid vendor, still retaining the dock-warrants solely for the convenience of the vendee, who preferred to postpone the time of delivery. I do not think he was in any sense an agent quâ sale or pledge or dealing of any kind of or in the goods. This being so, I think the argument of Mr. Bigham, who replied on behalf of the plaintiff, was well founded, and that, inasmuch as the practice which prevailed was shewn to be an ordinary practice in the trade, and one

1877

JOHNSON v. CRÉDIT LYONNAIS.

which had been acted on between Hofmann and the plaintiff for years, the case of *Cole* v. *North Western Bank* (1) applies, and that it cannot be said that Hofmann in the present case was "an agent intrusted with the possession" of the goods within the Factors Act, any more than Slee was in that case. Hofmann, indeed, was not intrusted with the goods for any purpose at all, except to clear them and forward them upon receipt of instructions, which he never received.

Upon these grounds I hold that the plaintiff is entitled to judgment.

*Judgment for the plaintiff for* 1250*l.* 18*s.* 8*d.*, *with costs: Execution stayed on the money being paid into court within a week.*

Solicitors for plaintiff: *Chester, Urquhart, Mayhew, & Holden, for Bailey & Read, Bolton.*

Solicitors for defendants: *Michael Abrahams & Roffey.*

---

HUMPHRIES *v.* COUSINS.

*Jan.* 13.

*Duty and Liability of Owners of adjoining Premises as to Nuisance.*

The plaintiff and the defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being decayed, the sewage escaped and flowing into the plaintiff's cellar did damage. The defendant was unaware of the existence of this return-drain, and consequently of its want of repair:—

*Held*, that the defendant was liable for the damage done to the plaintiff: for that defendant's duty was to keep the sewage which he himself was bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that this duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain.

CLAIM. That in June, 1875, the plaintiff was the occupier of a public-house, the Old Red Lion, No. 339 Strand, and the defendant was the occupier of No. 6 Helmet Court, Strand, which adjoins the public-house of the plaintiff. Through the negligence of the

(1) Law R p. 9 C. P. 470; on appeal, Law Rep. 10 C. P. 354.

1877

HUMPHRIES v. COUSINS.

defendant in not keeping in a proper state of repair the drains, parcel of his said house, large quantities of the water, filth, and drainage of the defendant coming and brought by him in and upon his said house and in his drains, and which were entitled to flow through his drains, and ought to have flowed through the same into the common sewer without causing any inconvenience to the plaintiff, ran and flowed from the drains, &c., of the defendant into and upon the said public-house of the plaintiff and the cellars of the plaintiff therein, and flooded, damaged, and injured the stock-in-trade, &c. Claim, 300 *l.*

The defence denied that the defendant did not keep in a proper state of repair his house, No. 6 Helmet Court, Strand, or the water-pipes, drains, &c., or that he was guilty of negligence in respect of any of the same; and also denied the damage to the plaintiff.

At the trial before Blackburn, J., at the last Trinity sittings at Westminster, it appeared that the plaintiff and the defendant were respectively tenants and occupiers of adjoining houses, as stated in the claim. Under the premises of the defendant was an old drain which passed thence through several other houses, receiving the sewage of each, then turned back through the defendant's premises, passed under the plaintiff's cellar, and thence away to a public sewer. The fact of the drain turning back through his premises was unknown to the defendant; nor was he aware that it was out of repair; but, by reason of the defective state from age and want of repair of the return-drain under the defendant's premises, the water and sewage from it flowed through the party-wall into the plaintiff's premises, and caused the damage complained of.

The jury found that the defective state of the drain was not attributable to any negligence on the part of the defendant; and they assessed the damages sustained by the plaintiff at 30*l.*

Nov. 10. *Talfourd Salter, Q.C.* moved for judgment for the plaintiff for the damages found by the jury. Upon the authority of *Tenant* v. *Goldwin* (1), *Hodgkinson* v. *Ennor* (2), and *Fletcher* v. *Rylands* (3), it being admitted that the sewage escaped from

(1) 2 Ld. Raym. 1089; 1 Salk. 360. (2) 4 B. & S. 229; 32 L. J. (Q.B.) 231. 3 Jur. N.S. 1152
(3) 3 H. & C. 774; Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.
12 Jur. N.S. 603

the defendant's premises into those of the plaintiff, and that the cause of that escape was the defective state of a drain under the defendant's premises, the defendant is responsible for the damage so occasioned; and it was no answer for him to say that the overflow was not caused by any voluntary negligence on his part, or that he did not know of the existence of the drain.

Nov. 15. *Robinson, Serjt.*, and *Shortt*, shewed cause. To render the defendant liable for the injury complained of, it must be shewn that he was aware of the existence of the drain: *Chadwick* v. *Trower* (1); *Hammond* v. *St. Pancras Vestry* (2); *Colebeck* v. *Girdlers Co.* (3) That was not only not shewn, but it was distinctly negatived by the jury. The question is whether there is an absolute liability cast upon the occupier of a house to keep a drain in repair, merely because it passes through his premises without doing him any service. In *Tenant* v. *Goldwin* (4) and *Fletcher* v. *Rylands* (5) the defendants brought the nuisance to the spot: see the observations on *Tenant* v. *Goldwin*, in Gale on Easements, 5th ed. p. 487. This "drain," as it is called, was in truth a "sewer:" see 18 & 19 Vict. c. 120, s. 250. (6)

[DENMAN, J. That point was not taken at the trial, and therefore cannot be urged here. It appears from the learned judge's notes that it was agreed on both sides that the only question was whether a person having a drain under his house is not bound to keep it so as not to do injury to his neighbour, although he has been guilty of no negligence, and the existence of the drain was not in any way known to him.]

In *Ross* v. *Fedden* (7), the plaintiff occupied for business purposes the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year. There was a water-closet on the defendant's premises to and of which they alone had access and use. After the premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to the plaintiff's premises and caused damage to his stock-in-trade. The overflow of water was

(1) 6 Bing. N. C. 1.
(2) Law Rep. 9 C. P. 316.
(3) 1 Q. B. D. 234.
(4) 2 Ld. Raym. 1089; 1 Salk. 360.
(5) 3 H. & C. 774; Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.
(6) See note at the end of the case.
(7) Law Rep. 7 Q. B. 661.

12 Jur 45603

1877

HUMPHRIES v. COUSINS.

owing to the valve of the supply-pipe to the pan of the closet having got out of order and failed to close, and the waste-pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence; and it was held that there was no obligation on the defendants to keep in the water at their peril, and that they were not liable to the plaintiff for the damage.

[DENMAN, J., referred to *Bell v. Twentyman* (1) and also to *Hodgkinson* v. *Ennor* (2), where Blackburn, J., says (3): "I take the law to be as stated in *Tenant* v. *Goldwin* (4), that you must not injure the property of your neighbour, and consequently, if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, 'he whose dirt it is must keep it that it may not trespass.'"]

*Talfourd Salter*, *Q.C.*, and *C. Scott*, in reply. If this case is brought within the judgment of Lord Holt in *Tenant* v. *Goldwin* (4) as accepted and expressed by Blackburn, J., in *Fletcher* v. *Rylands* (5), and in other cases, and assented to by Lord Cairns, L.C., in the House of Lords (6), the plaintiff is entitled to the judgment of the Court. It is agreed that the damage done to the plaintiff arose from the sewage coming from the defendant's premises, that the cause of its escape was that the drain under the defendant's premises was out of repair, and that the defendant, being the occupier of the premises, was bound to repair it, that being a duty which the law casts upon him, and from the performance of which his ignorance of its existence does not excuse him. He has failed to perform the obligation which the law casts upon him of taking care that his filth does not injure his neighbour. In *Broder* v. *Saillard* (7), it was held that the occupier of a house is liable if he allows the continuance on his premises of an artificial work which causes a nuisance to a neighbour, even though it has been put there before he took possession.

*Cur. adv. vult.*

(1) 1 Q. B. 766.
(2) 4 B. & S. 229; 32 L. J. (Q.B.) 231. 9 Jur. N.S. 1152
(3) 4 B. & S. at p. 241; 32 L. J. (Q.B.) at p. 236. 9 Jur. N.S. 1154
(4) 2 Ld. Raym. 1089; 1 Salk. 360.
(5) Law Rep. 3 Ex. at p. 283, et seq. 12 Jur. N.S. 665.
(6) Law Rep. 7 H. L. 339.
(7) 2 Ch. D. 692.

1877

HUMPHRIES v. COUSINS.

Jan. 13. The judgment of the Court (Denman and Lindley, JJ.), was delivered by

DENMAN, J. The plaintiff and the defendant in this case are tenants and occupiers of adjoining houses; and the plaintiff, upon the facts and findings of the jury, now complains of injuries caused to his premises and stock-in-trade by water and sewage coming into his cellar from the defendant's premises. The jury have found in effect that the injuries complained of were so caused, and have assessed the damages sustained by the plaintiff at 30*l*. The plaintiff has moved for judgment for the amount of the damages so assessed.

The facts relied on as a defence to the action are in substance as follows:—An old drain which commenced on the defendant's premises and received his sewage, ran under and received the sewage of several other houses, turned back through the defendant's premises, ran under the plaintiff's cellar, and then away to a main sewer. This drain was not known to the defendant to turn back and run through his premises under those of the plaintiff, and was not known to be out of repair. It was, however, in fact out of repair by reason of age and wear and tear; and its defective state under the defendant's premises was the real cause of the mischief. The jury found that the defective state of the drain was not attributable to any negligence of the defendant.

Upon these facts, it is to be observed at the outset that the water and sewage which injured the plaintiff came on to the defendant's land by an artificial drain, made for the convenience of the defendant and the other persons whose houses were higher up. We have not, therefore, to deal, as the Court had in *Smith* v. *Kenrick* (1), with the case of water or other matter coming naturally from or through the defendant's land on to the plaintiff's. Bearing this in mind, it appears to us that it is incumbent on the defendant to shew what right he had to allow the filth brought artificially on his land to escape on to the land of the plaintiff.

The primâ facie right of every occupier of a piece of land is, to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter; but

(1) 7 C. B. 515; 18 L. J. (C.P.) 172.

1877

HUMPHRIES v. COUSINS.

the burthen of shewing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.

That these are the rights of an occupier of land appears to us to be established by the cases of *Smith* v. *Kenrick* (1), *Baird* v. *Williamson* (2), *Fletcher* v. *Rylands* (3), and the older authorities there referred to, and the recent decision of *Broder* v. *Saillard*. (4)

In the present case, the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise; he was not bound to receive it through the surrounding earth or the party-wall, through which in fact it came. Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain on any of the dominant tenements. The plaintiff's rights, therefore, have been infringed, and the loss he has sustained cannot be said to be damnum absque injuriâ. (See the note to *Ashby* v. *White* in 1 Sm. L. C. 284, 7th ed.)

But the question still remains, has the defendant infringed those rights, and is he the person liable for the infringement? It is said this case is not like *Tenant* v. *Goldwin* (5) or *Fletcher* v. *Rylands* (3), because in both of those cases the defendant himself brought on his land that which occasioned the mischief; whereas, in this case, the defendant received the sewage, and was bound so to do. So far, however, as we can judge, some of the sewage must in fact have come from the defendant's own premises in the first instance. But, even if this is not to be taken as proved, we are of opinion that, as between the plaintiff and the defendant, it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises to

(1) 7 C. B. 515; 18 L. J. (C.P.) 172.
(2) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.
(3) 3 H. & C. 774; Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.
(4) 2 Ch. D. 692.
(5) 2 Ld. Raym. 1089; 1 Salk. 360.

the plaintiff's premises, otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land (see *Russell* v. *Shenton* (1)), and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge; and the fact that he unknowingly received it affords no justification for allowing it to escape in a manner in which he had no right to let it pass. *Fletcher* v. *Rylands* (2) is a strong authority to shew that this conclusion is correct; for, although in that case the defendant knew of the existence of his reservoir, he did not know that the ground underneath it was in such a state as to render its existence dangerous; and it was strenuously but ineffectually urged that he could not be liable in respect of damage caused by a state of things of which he knew nothing. *Bell* v. *Twentyman* (3) is a strong authority to the like effect. Indeed, if it be once established that the plaintiff's rights have been infringed by the defendant, and that the plaintiff has been thereby damnified, the fact that the defendant infringed them unknowingly and without negligence cannot avail him as a defence to an action by the plaintiff: see *Lambert* v. *Bessey*. (4) In short, we think that the true doctrine is contained in the following passage of the judgment of Blackburn, J., in the case of *Hodgkinson* v. *Ennor* (5),—"I take the law to be as stated in *Tenant* v. *Goldwin* (6), that you must not injure the property of your neighbour, and *consequently*, if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, 'he whose dirt it is must keep it that it may not trespass.'"

The case of *Hammond* v. *St. Pancras Vestry* (7), which was relied upon by the counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the

(1) 3 Q. B. 449.
(2) 3 H. & C. 774; Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.
(3) 1 Q. B. 766.
(4) Sir T. Raym. 421.
(5) 4 B. & S. at p. 241; 32 L. J. (Q.B.) at p. 236.
(6) 2 Ld. Raym. 1089; Salk. 21, 360; 6 Mod. 311; Holt, 500.
(7) Law Rep. 9 C. P. 316.

1877

HUMPHRIES v. COUSINS.

clauses of a particular Act of Parliament imposing certain duties upon a public body; and no question arose as to the common-law liability of the occupiers of adjoining premises. (See the judgment of Brett, J. (1))

It was contended that the present case was governed by *Ross* v. *Fedden* (2); but that was a case in which the plaintiff and the defendant occupied separate storeys in the same house; and it was expressly distinguished from a case like the present, which depends simply on those principles of law which regulate the rights and duties of occupiers of adjacent pieces of land. The case of *Carstairs* v. *Taylor* (3) is also clearly distinguishable on the same ground.

The question whether the defendant was bound, as between himself and the plaintiff, to repair the drain, or so much of it as ran under the defendant's land, was much discussed, but does not really arise; for, the plaintiff's cause of action as finally relied upon is, not that the defendant omitted to repair the drain, but that he omitted to prevent the sewage on his land from coming on the plaintiff's land otherwise than as the plaintiff was bound to receive it. If the defendant had prevented the sewage from so coming, the plaintiff would have had no cause of action, whether the drain was repaired by the defendant or not.

The defendant may perhaps be entitled, as between himself and the owners and occupiers of the other dominant tenements, to call upon them to contribute to the expenses of keeping his and their common drain in repair; and it may be that the plaintiff might have sued all those owners or occupiers (including the defendant) for the damage which he has sustained by reason of such non-repair. But, even if the plaintiff could have sued them all, he was not in our opinion bound to do so: he was not bound to rest his case on his ability to establish a duty on them to repair the drain, and a breach of such duty by all who used it.

Lastly, it was contended that, as the defendant was only a tenant, and not an owner, he was not responsible: but he was in point of law tenant in possession, not only of the surface, but of whatever was beneath it, and as such responsible to the plaintiff: see

(1) Law Rep. 9 C. P. at p. 322. (2) Law Rep. 7 Q. B. 661.
(3) Law Rep. 6 Ex. 217.

*Russell* v. *Shenton* (1); and he could himself have maintained an action for any invasion of such possession.

For these reasons, our judgment is for the plaintiff.

*Judgment for the plaintiff.* (2)

Solicitors for plaintiff: *Thomas Beard & Son.*

Solicitors for defendant: *Halse, Trustram, & Co.*

---

[IN THE COURT OF APPEAL.]

*Feb.* 6.

FRENCH AND ANOTHER *v.* GERBER AND OTHERS.

*Shipping—Charterparty—Cesser of Liability—Demurrage—Lien.*

Defendants chartered plaintiffs' ship to carry a cargo of rice to a good and safe port, calling at another port for orders which were to be forwarded within forty-eight hours after notice of her arrival or lay-days to count. Twelve working laying-days to be allowed the freighters for loading the ship at port of loading and waiting for orders at port of call, and fifteen days on demurrage allowed over and above the laying-days, at 4*d.* per ton per day. It was further agreed "that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise." The ship arrived at the port of call with a cargo worth the freight, and notice was given to the defendants.

In an action against the charterers (who had sold the cargo before arrival at the port of call) two breaches of contract were assigned: 1, that the defendants did not give orders as to the ship's port of discharge; 2, that they gave orders for the ship to discharge at a port which was not a good and safe port; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:—

*Held*, affirming the judgment of the Common Pleas Division, that the exoneration clause discharged the defendants from liability for the breaches.

DECLARATION that the plaintiffs, owners of the ship *Theresa*, by the master, and the defendants, by Burot, Gerber, & Co., their

(1) 3 Q. B. 449.

(2) The defendant appealed; and his counsel again took the point that the drain in question was a sewer within the definition of s. 250 of 18 & 19 Vict. c. 120, and was vested either in the vestry or the district board under s. 68.

Counsel for the plaintiff admitted that the objection would be fatal, but urged that it was too late to take the defence, as it was not raised by the pleadings nor taken at the trial.

The Court of Appeal intimated that a stet processus was the best course for all parties, which was accordingly assented to.

1877

FRENCH v. GERBER.

agents at Akyab, entered into a charterparty of which the following are the material parts:—

"Akyab, 8th April, 1874.

"It is this day mutually agreed between Mr. R. C. Downie, in command of the ship *Theresa*, . . . . now off Akyab, and Messrs. Burot, Gerber, & Co., of Akyab, merchants and freighters, that the ship . . . . shall with all convenient speed sail and proceed to a loading berth in the port of Akyab, . . . . and load from the agents of the freighters . . . . a full and complete cargo of rice, in bags as usual, . . . . and being so loaded, shall therewith proceed with all dispatch to Queenstown or Falmouth (at the option of the master) for orders, to be forwarded within 48 hours after notice of said arrival has been given to and received by charterers' agents in London, or lay-days to count, to discharge at a good and safe port in the United Kingdom, or on the continent, between Bourdeaux and Hamburg, both inclusive, or so near thereunto as she may safely get, and deliver the same in any dock freighters may appoint, always afloat, agreeably to bills of lading, on being paid freight in full of all, &c., at the rate of 60s. sterling per ton of 20 cwt. net delivered. . . . . Twelve working laying days (Sundays excepted) are to be allowed the freighters for loading the said ship at port of loading and waiting for orders at port of call in Europe, to commence and to be computed 24 hours after the master has given notice in writing to charterers' agents that the ship is ready to receive cargo; and 15 days on demurrage are allowed over and above the said laying days at 4*d.* per register ton per day. . . . . The captain to sign bills of lading for his cargo at no lower rate of freight than stipulated in this charterparty; failing which charterers shall not be responsible for such difference. . . . . All questions of general average to be settled according to the custom of the London underwriters at Lloyd's. Freighters to have the power of underletting the whole or part of the vessel. . . . .

"It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise"

That the *Theresa* was loaded with a cargo of rice and proceeded to Falmouth, and on her arrival due notice was given to defendants or their agents. First breach, that the defendants or their agents did not give and refused to give orders as to the port of discharge. Second breach, that the defendants gave orders for a port of discharge which was not a good and safe port. Whereby the plaintiffs were delayed, and incurred expense in obtaining payment of the freight.

Plea, that the cargo was sold by defendants before arrival, and was worth the freight at the port of discharge, by reason of which defendants' liability under the charterparty ceased.

Demurrer and joinder.

The Common Pleas Division held that the defendants were by

the clause of exoneration discharged from liability for both breaches. (1)

The plaintiffs appealed.

*French* and *Granger*, for the plaintiffs. The clause of exemption from liability is common in charterparties, and is intended to give the charterer power to stop the ship if he feels doubtful of the solvency of the buyer, but it is not intended to relieve the charterer from liability except so far as the lien extends. The whole clause must be read together, and then it is clear that the relief from liability is only co-extensive with the lien: *Kish* v. *Cory*. (2) It is absurd to suppose that the shipowners have exposed themselves to possible loss, and have abandoned all claim to compensation. The clause in *Sanguinetti* v. *Pacific Steam Navigation Co.* (3) was different. *Gray* v. *Carr* (4) and *Francesco* v. *Massey* (5) shew the meaning which has been put on such clauses. There is another form of charterparty, as in *Milvain* v. *Perez* (6), under which no doubt all liability does cease when the ship is loaded; but that is not the form used here, and there are many parts of this charter which can be performed only after the ship has been loaded, and as to which it cannot be supposed that the shipowners have left themselves at the mercy of the charterer.

*J. C. Mathew*, for the defendants. This charter must be read as it stands, and there is no reason to suppose that the parties did not mean it to say what it does say, and that the shipowners were not, for the sake of getting the freight, content to run the risk of a loss which would be incurred in very few cases. There is nothing to confine the exemption to breaches which occurred before the ship was loaded, or to those for which a lien is given. All these things must have been considered, for the exemption is not absolute, but arises only if the cargo is of sufficient value.

*French*, in reply.

MELLISH, L.J. I am of opinion that the judgment of the Common Pleas Division ought to be affirmed. [The Lord Justice stated the nature of the action and of the defence.] There

(1) 1 C. P. D. 737.
(2) Law Rep. 10 Q. B. 553.
(3) 2 Q. B. D. 238.
(4) Law Rep. 6 Q. B. 522.
(5) Law Rep. 8 Ex. 101.
(6) 3 E. & E. 495; 30 L. J. (Q.B.) 90.

1877

FRENCH v. GERBER.

have been many cases as to clauses of this description, and no doubt it has been held in several of them that the exoneration from liability ought not to be extended beyond the lien. That principle has been laid down exclusively in cases where the breach occurred before the loading, yet the Courts have always tried to reconcile the whole charter and to make the liability co-extensive with the exoneration. For that purpose the Courts have extended the words of the clause giving the lien, and have sometimes made the lien for demurrage include the lien for detention in the nature of demurrage. We ought, therefore, in construing this charter, to see whether we cannot give a reasonable construction to the whole, taking the words of exoneration in their natural sense, which seems to discharge the charterers from all liability whatever; and at the same time we ought to see how far the lien can be extended, so as to give the shipowners an adequate remedy for any breach of the charter of which they may be entitled to complain.

The breaches complained of relate exclusively to the charterers not having given proper orders at the port of call. Now, the charter does provide a remedy—which may be sufficient or insufficient, but still is a remedy—independently of the mere contract, viz., that if the charterers do not give notice of the port of discharge within forty-eight hours after they or their agents have received notice of the arrival at the port of call, then the lay-days are to count. But the charter does not stop there, because it says in a subsequent part that certain days on demurrage are to be allowed to the freighters over and above the lay-days, which shews clearly that if the charterers do not give notice in due time the lay-days are to count, and if the lay-days are exhausted, then the demurrage days are to count.

The question, to my mind, is whether the parties have not reasonably supposed that that was a sufficient remedy for any inconvenience or damage which the shipowners were likely to sustain, from not getting proper orders as to the port of discharge. It appears to me that they may have reasonably supposed that it would be so. The charter was a rice charter; it contemplated that bills of lading were to be signed, and that the charter might be underlet; it was also probably within the contemplation of the parties that the charterers might sell this cargo while it was on

the passage, and it would be in the ordinary course of business that they should do so. Their object in having this particular clause inserted in the contract is plainly that when they have loaded the cargo, and the ship is dispatched, and they sell the cargo, they may be entirely free from the matter, and the shipowners may look for their remedy against the persons purchasing the cargo. If there was some clause in the charter upon which it was perfectly plain that no remedy was given by the lien as against the purchaser of the cargo, then I certainly should have struggled to hold that this clause could not exonerate the charterers from paying damages. But when I see what the breaches in this case are, and that they are breaches which are provided for, and intended purposely to be provided for, so that the shipowners may have a remedy, not only against the charterers, but against whoever may be the owner of the cargo, it appears to me that the charterers purposely inserted that which they considered would be a sufficient remedy, and I think it is a sufficient remedy for the shipowners in respect of those breaches, and that it would be wrong to hold that the charterers were still liable for those breaches.

In my opinion, according to the plain meaning of the words, they should be discharged. Mr. French, with great ability, went all through the clauses of the charter, for the purpose of finding some in which there was an agreement on the part of the charterers to do something after the vessel was loaded, in respect of which the shipowners would have no remedy, if the clause of exoneration is to be construed generally. He relied upon the clause about the average, to be settled according to the custom at Lloyd's, but I do not think that that makes any difference. It is true that the charter does not say in terms how the average should be stated; but I think that the shipowners have their remedy against the owners of the cargo in respect of that. I cannot find that this charter does in substance contain any clause as to damages, which is so plainly not covered by the lien that one may fairly say that the parties cannot have intended what they have apparently said, namely, that the charterers should be entirely exonerated. The true construction of the charter appears to me to entirely exonerate them in respect of subsequent

1877

FRENCH v. GERBER.

breaches, and therefore I think that the decision of the Court below should be affirmed.

BAGGALLAY, L.J. As my colleagues concur in the opinion that the judgment of the Common Pleas Division should be affirmed, it is immaterial whether the doubts which I entertain upon the subject are well or ill founded. In all probability they are ill-founded; but I do at the present moment entertain some doubts upon the question.

I think that the strength of the argument which Mr. French has addressed to us is upon the construction of the exoneration clause, for I am not much pressed with the argument which he has addressed to us upon what he called the special contracts of the charterparty. Perhaps the most effective argument was that founded on the clause which provided that orders should be forwarded forty-eight hours after the arrival at the port of call. But I think that Mr. Mathew has given a good answer—that the exemption from liability was not to take place in the event of the cargo becoming of less value than the freight. Then as regards the construction of the exoneration clause, I think that the effect of the decisions which have been cited in the course of the argument amounts to this, that the exoneration from liability is co-extensive with the creation of the lien. It is true, as has been pointed out, that these decisions have been given in cases of liability accruing before loading, but I do not feel satisfied that there should be any distinction drawn in that respect between liabilities accruing before and those accruing after loading.

But I entertain a further doubt, which operates in the other direction. Assuming that the exoneration is limited to the extent to which the lien is created by the clause in question, I doubt whether the damages which have been sustained in this case are not in point of fact such as would be covered by the lien which is given. I do not feel satisfied upon that point; if I did my judgment would in no respect differ from the conclusions at which my colleagues have arrived.

BRAMWELL, L.J. If I had known that Sir Richard Baggallay entertained doubts to the extent he has expressed, I should have wished to take time to consider whether my own opinion was well

founded, but as it is I must give utterance to it. Now I think that there was here a contract to give notice within forty-eight hours, or, at all events, that there was what would be a contract to give notice within a reasonable time, of a port of discharge. I think that, if the agent of the charterers said, "We will not tell you the port of discharge, and you may take your own course, and land your goods at Falmouth, and take your remedy," then there would have been a breach of the contract, except for what I am going to call attention to; and I do not think that the clause that lay-days may count after the forty-eight hours is an entire compensation for all the damage that might happen for want of such notice being given.

That being so, the question is whether, supposing that there is a contract, or that there would have been a contract but for this clause, there is anything to shew that the liability is to cease. The meaning of the words as they stand alone is, that the liability shall cease as soon as the cargo is put on board, if it should turn out to be of a sufficient value; and what Mr. French, in what I concur in thinking was a very able argument, wants us to do is to insert after the words "the liability of the charterers shall cease," the words "as to all matters as to which a lien is given"—that is, freight, dead freight, and demurrage; but this is a thing that ought not to be done without almost a necessity for so doing, because the parties could have added those words if they had thought fit, and they have not done so.

Now is there such a necessity? What does Mr. French rely upon? First of all, he relies upon the argument that there are various other matters, which he says are not provided for; but I think that the Lord Justice has sufficiently dealt with those matters. Mr. French says there are certain authorities which shew that the exemption from liability, or the freedom from liability, upon the cargo being loaded, extends only to those matters as to which the lien is given. I do not find that to be so; I do find that as to breaches antecedent to the loading of the cargo it has been so held, and, it seems to me, reasonably so held, on two grounds: first, that where a breach of a contract has been committed a right of action exists, and it cannot be that those words, "all liability is to cease," extend to relieve the charterer

1877

FRENCH v. GERBER.

from the right of action as to those breaches. Secondly, there is a sort of technical reason that a cause of action once vested cannot be legally divested. Then, on the reason of the thing, Mr. French argues thus: "Does not it stand to reason that those words must be introduced, and this clause must be limited in that way, because otherwise you have that which, under other circumstances, would be a contract prevented from being a contract, and you have that which is a contract left in a situation in which it may be broken and no remedy given." That is an ingenious argument, but we must look upon cases of this kind from a practical point of view, and it is perfectly intelligible that this very matter might have been discussed between the charterers and the shipowners. The shipowners might have said, "But what if no notice is given?" and the others might have said, "Take the charter upon those terms or leave it alone. We are not going to be troubled with quarrels on the other side of the water. If you do not think this makes you safe enough, do not enter into the charter." Is there anything so unreasonable in this supposition, that to guard against it we must insert words that are not there? It seems to me that there is not, especially when it is borne in mind that really and practically, as Mr. Mathew said, in ninety-nine cases out of a hundred, no question of this sort would arise. The clause says that if notice is not given in due time, the delay shall count as lay-days, and that is ample protection to the shipowner. Is it, then, reasonable to say that this was a risk which the shipowners were not willing to undertake? If it was present to the minds of the shipowners, there is no reason why the words should be inserted by us, because the only ground for inserting them is to suppose that the parties must have intended them. If they were not thinking of the risk, they did not intend the words to be inserted; and if they were thinking of it, they were perfectly satisfied with the provisions made for the shipowners. I think, therefore, that the judgment of the Court below should be affirmed.

*Judgment affirmed.*

Solicitors for plaintiffs: *Vizard, Crowder, & Co., for Yates, Son, & Co., Liverpool.*

Solicitors for defendants: *Hollams, Son, & Coward.*

[IN THE COURT OF APPEAL.]

1877
*May* 4.

COOK *v.* WARD.

*Local Board—Delegation of Powers to a Committee—Land Drainage Act*, 1861 (24 & 25 *Vict. c.* 133), *sched. Part II., clause* 6.

Where a board constituted by an Act of Parliament are authorized by it to delegate any of their powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert; and it is not competent to the committee to apportion amongst themselves the duties so delegated to them; and one of them acting alone, pursuant to such apportionment, cannot justify his acts under the Act of Parliament.

CLAIM. 1. The plaintiff was possessed of two closes of land situate in that portion of Deeping St. Nicholas, in the county of Lincoln, known as the Counter Drain Washes, and bounded by lands of R. Everard towards the east, by the Counter Drain towards the south, and by lands of R. Parr's devisees towards the west, and of a ditch and of two gateways or passages forming the entrance from the road on the bank of the river Glen over the said ditch into the said respective closes, and of certain other lands near to the said ditch, all situate in the parish of Deeping St. Nicholas, in the county of Lincoln.

2. The water passing along the said ditch lawfully passed and was carried by means of culverts or tunnels under the said gateways or passages forming such entrance as aforesaid.

3. At divers times in July, 1875, the defendant wrongfully broke and entered the said closes and the said ditch and passages and gateways respectively, and broke down and dug up and destroyed the said passages and gateways, and the said culverts and tunnels under the same respectively, and dug holes in the said closes and passages and gateways respectively, and removed large quantities of earth and soil therefrom, and damaged and destroyed the same.

4. By means of the premises, large quantities of water were wrongfully caused and permitted to flow and did flow from off certain lands of the defendant and other lands through and along the said ditch into and upon the said closes and the said other lands of the plaintiff, and remained thereon for a long time, and

1877

COOK v. WARD.

damaged the crops and seeds of the plaintiff then growing thereon, and the plaintiff was deprived of means of access for himself and his cattle to and from the said closes and the said road, and lost the use of the said closes and other lands, and was otherwise damnified.

The plaintiff claimed 220*l.* damages and such further or other relief, by injunction or otherwise, as the nature of the case might require.

The defence, so far as is material, was as follows :—

5. The Counter Drain Washes is a drainage district duly constituted under the Land Drainage Act, 1861, and the Land Drainage Supplemental Act, 1873.

6. Before the happening of the alleged grievances, or any of them, the defendant had been duly appointed a member of the drainage board of the said district.

7. Such of the acts in the statement of claim complained of as were done by or under the authority of the defendant were so done by him in his capacity of member of the board, and under and by virtue of the authority of the board and of a committee thereof duly constituted, and were within the powers conferred upon the defendant as and being a member of such drainage board, and upon the said drainage board and the said committee thereof, by the Land Drainage Act, 1861, and the Land Drainage Supplemental Act, 1873, and the defendant has not done anything in excess of such powers, nor did he in doing the said acts cause to the plaintiff any unnecessary damage.

8. Immediately before the happening of the events in the statement of claim complained of a large quantity of rain had fallen, and a certain dyke called the Soak Dyke was full of water, and there was not sufficient outfall for the water therein: thereupon the defendant, as such member of the drainage board as aforesaid, and acting under the authority of the said board and of a committee thereof duly constituted, caused certain culverts or tunnels which had been previously constructed by the said drainage board in order to carry off the water from the said Soak Dyke, to be laid open in order to provide a better outfall for the water from the said Soak Dyke, and otherwise cleaned out and enlarged the said tunnels. Averment, that the acts

in this paragraph mentioned were the alleged grievances in the statement of claim complained of, and that the said acts were done by the defendant in such capacity and under such authority as in the last-preceding paragraph mentioned, and were deemed by the defendant to be and were in fact reasonable and proper to be done in order to carry off the flood-water which had accumulated within the said drainage district. Issue thereon.

The cause was tried before Mellor, J., at the last Easter assizes at Lincoln. The district in which the plaintiff's land was situate was by a provisional order of the Inclosure Commissioners made on the 6th of February, 1873, in pursuance of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), constituted a separate drainage district by the name of The Deeping Fen Separate Drainage District; which provisional order was confirmed by the Land Drainage Supplemental Act, 1873, 36 Vict. c. xxiv. By that provisional order it was provided that the drainage board for the district should consist of nine members, of whom the defendant was one.

The first part of the Land Drainage Act, 1861, deals with the commissions of sewers and the powers and duties of the commissioners. The second part, commencing with s. 63, deals with the formation of drainage districts. Sect. 66 enacts that "the superintendence of matters relating to drainage within a drainage district shall be vested in a board thereinafter called a drainage board, and such board shall be a body corporate," &c. Sect. 67 enacts that "all powers by this Act or by any other Act of Parliament, law, or custom, vested in or exerciseable by commissioners of sewers within the limits of their jurisdiction, may, upon the constitution of a drainage district, be exercised by the drainage board of such district within its limits, and all powers hitherto exerciseable by commissioners of sewers within such district shall cease," &c. And s. 70 enacts that, "subject to any provisions to the contrary that may be made by the provisional order constituting the district, the mode of electing members of drainage boards, and the proceedings of drainage boards, shall be conducted in manner directed by the schedule annexed hereto."

Part I. of the schedule contains the rules as to the election of members of drainage boards; and Part II. the rules governing the proceedings of drainage boards. The first clause of Part II. of the

1877

COOK v. WARD.

schedule provides that "a drainage board shall meet together for the dispatch of business, and shall from time to time make such regulations with respect to the summoning, notice, place, management, and adjournment of such meetings, and generally with respect to the transaction and management of business as they think fit, subject to the following condition,—that (*a*) No business shall be transacted at any meeting unless at least three members are present at the commencement and close of the business; (*c*) All questions shall be decided by a majority of votes of the members present; (*d*) The names of the members present, as well as of those voting upon each question, shall be recorded." Clause 6 provides that "The board may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers delegated, conform to any regulations that may be imposed on them by the board." Clause 8 provides that "a committee may meet and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present; and, in case of an equal division of votes, the chairman shall have a second or casting vote." And clause 9 provides that "The board shall cause minutes to be made, in books provided for that purpose, (1.) Of all the appointments of officers made by the board; (2.) Of the names of the members present at each meeting of the board and committees of the board; (3.) Of all orders made by the board and committees of the board; and (4.) Of all resolutions and proceedings of meetings of the board and of committees of the board. And any such minutes as aforesaid, if signed by any person purporting to be the chairman of any meeting of the board or committee of the board, shall be receivable in evidence without any further proof."

At a duly convened meeting of the Deeping Fen Drainage Board held on the 27th of April, 1875, the following resolution was passed:—"Resolved that Mr. R. Ward, Mr. S. Andrews, and Mr. Charles Plowright be appointed a committee to act in any case of emergency, with all the powers conferred by the provisional order 15th May, 1873, on such committee."

The way in which the committee carried out that resolution was as follows:—The Soak Dyke, a ditch or drain which received the

soakage and overflow of the river Glen, and which passed in front of certain lands of the plaintiff and of several other persons, being four or five miles long, the three members of the committee named in the above resolution agreed among themselves that a portion should be allotted to each of them over which he was to watch, and, in case of emergency, to execute the power delegated to the committee by the board: and in the execution of the power so delegated to him by his co-committeemen the defendant, for the purpose of more conveniently letting off the water which had accumulated in the dyke from the excessive rainfall and the overflow of the river Glen, cut through the gateways leading to the plaintiff's closes, the tunnels or culverts thereunder being too small to allow the water to pass away with sufficient rapidity.

There was evidence to shew that the course pursued by the defendant was a reasonable and proper one, and was necessary to preserve the adjoining lands (including the plaintiff's) from being inundated, and that it was approved by the other two members of the committee; but it was insisted on the part of the plaintiff that the mode of proceeding was unauthorized by the statute, inasmuch as it was not the act of the three acting jointly as a committee.

The learned judge left five questions to the jury,—1. Was the damage done to the plaintiff's land occasioned by the excessive rainfall combined with the soakage and overflow of the Glen and Counter Drain and the shutting of the staunch at the outfall of the tunnel? 2. Was any damage done to the plaintiff's land by the act of cutting the gateways which could be estimated as the result of that act? 3. Was the cutting of the gateways a reasonable and proper act under the circumstances, and was it done with ordinary and reasonable care? 4. Did the defendant act in the reasonable belief that he was doing that which was for the best under the provisions of the Land Drainage Act and the powers conferred on the committee? 5. Was the act of cutting the gateways authorized by the other two members of the committee?

The jury answered the second question in the negative, and all the others in the affirmative; whereupon the learned judge entered a verdict for the defendant. He, however, directed the jury to assess (contingently) the damages resulting to the plaintiff from

1877

COOK v. WARD.

the cutting of the gateways. The jury assessed the damages at 1*s*. Leave was reserved to the plaintiff to move to enter a verdict and judgment for 1*s*., without costs, in the event of the Court being of opinion that the Act of Parliament afforded no justification to the defendant.

Jan. 11. *Graham*, for the plaintiff, moved accordingly. The plaintiff is entitled to a verdict and judgment for 1*s*. He cannot ask for more, inasmuch as the jury were unable to estimate the damage he had sustained. The whole scope of the Land Drainage Act, 1861, shews that the powers given to the local board and to the committee must be exercised by them acting in concert and at a meeting. The board may, it is true, by the 6th clause of the second schedule, delegate any of their powers to committees; but the committee must, in the exercise of the powers so delegated to them, conform to the regulations imposed on them by the Act. Here, the resolution of the 27th of April, 1875, appointed the three persons named to act as a committee: they could only act in concert, and could not delegate any part of the authority conferred upon them to one of their number. The persons whose lands were to be interfered with were entitled to have the judgment of the three, or of the majority of them, before they could legally do what they did. It was distinctly laid down by the Court of Exchequer, in *D'Arcy* v. *Tamar, Kit Hill, and Callington Ry. Co.* (1), that a committee having powers delegated to them as a body by a public board, must exercise those powers jointly. There, the prescribed quorum of directors of a railway company being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority: the company being sued upon this bond, it was held that the seal was affixed without lawful authority, and that the company were therefore not liable on the bond. Martin, B., said: "It is not necessary that there should be any fixed place of meeting; but it is quite clear that the directors are to act together and in a meeting; whereas, the authority on which the secretary acted was given by two only

(1) Law Rep. 2 Ex. 158.

acting together, and by the subsequent assent of the third. The authority, therefore, was not of such a character as enabled the secretary to affix the seal so as to bind the company." And Bramwell, B., said: "The seal was not properly affixed; for, this could not be done except by the authority of such a number of directors as had power to act for the company, acting jointly and as a board."

*Mellor, Q.C.*, and *Fitzgerald*, shewed cause. The committee were expressly appointed to act in case of an emergency. This was a case of emergency, and the jury have found that the work was proper to be done, and was done bonâ fide, and authorized by the other two members of the committee. The subdivision of the district to be overlooked was essential, by reason of its extent; and there was no time for the three to meet and consult.

[LORD COLERIDGE, C.J. Might not the board, if they had thought fit, have delegated these powers to a committee consisting of one member only?]

No doubt.

LORD COLERIDGE, C.J. I think the plaintiff is entitled to have judgment entered for him for 1*s.*, without costs. I have come to this conclusion with reluctance, because I find that in this case the power which the defendant assumed to exercise was exercised bonâ fide, and, if not to the direct advantage of the plaintiff, at least not with any appreciable damage. The case raises a grave question upon an important Act of Parliament. It may be convenient that such things as were done here should be done in cases of emergency: but the powers conferred by the Act in question are very strong, practically superseding to a great extent the rights of private property, an interference with which is only permitted where it is for the general good; and in all cases the authority must be strictly followed. The question turns upon the true meaning of the 6th and 8th rules of the second schedule. The 6th provides that the "board may delegate any of their powers to committees consisting of such *member or members* of their body as they think fit. Any committee so formed shall, in the exercise of the powers delegated, conform to any regulations that may be imposed on them by the board." The 8th rule provides that "a committee may meet

1877

COOK v. WARD.

and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present; and, in case of an equal division of votes, the chairman shall have a second or casting vote." Now, what was done here was not done in strict conformity with those provisions. Under clause 6 of the schedule it may be that the board might have delegated this power to a single member of their body. They have, however, delegated it to three. The resolution is, "That Mr. Ward, Mr. Andrews, and Mr. Plowright be appointed a committee to act in any case of emergency, with all the powers conferred by the provisional order 15th May, 1873, on such committee." Now, neither the rules, the provisional order, nor the resolution appointing the committee confer upon them the power of acting otherwise than in concert. Being a plural body, they must conform to the regulations which govern all such bodies, and must act according to the provisions of the 8th clause, which manifestly contemplates the bringing together of the whole of the members of the committee in order that they may exercise a joint judgment in each case. Here is not even an informal assent of the three, as there was in *D'Arcy* v. *Tamar, Kit Hill, and Callington Ry. Co.* (1) The committee, it seems, met and agreed that the part of the drain in question should be dealt with exclusively by the defendant. That was, in effect, the committee assuming to clothe the defendant, a member of their body, with a power which the board alone could clothe him with. It was not competent to them to delegate powers, which required the united action of the three, to be exercised according to the unaided judgment of one of them. I come therefore to the conclusion that these powers should be carefully maintained by the Courts; that the authority given by the Act has not been exercised either according to the letter or the spirit; and that judgment should be entered for the plaintiff for 1*s.* without costs.

LINDLEY, J. I am of the same opinion. It is a well-established rule, and one which is essential to the protection of the public, that powers conferred by parliament shall be executed strictly in the manner which parliament contemplated. The Act is divided

(1) Law Rep. 2 Ex. 158. 12 Jur N S 548

into two parts. The first part deals with the general scheme for district drainage, and the second part prescribes the mode in which it shall be carried out by means of local drainage boards. The powers of the local board are regulated by the schedule annexed to the Act: and, when we look at what those powers are, we find that no authority is conferred on the local board to delegate their powers, except that which is conferred upon them by clause 6 of the second part of that schedule,—"The board may delegate any of their powers to committees consisting of such *member* or *members* of their body as they think fit." That gives the extent of their power to delegate. I will assume that the board may delegate their powers, to *one* of their body; but that could only be because the board in their collective capacity have confidence in his skill and ability. But here the difficulty is that they have not done so. They have delegated the power to do the work in question to a committee consisting of three individuals. Whatever is done by the persons so selected must be the joint act of the three; it was not competent to the committee to delegate any of their powers to one or two of their number. What was done here might be quite right and convenient if the Act of Parliament had been followed; but the public are entitled to be protected against the chance of mischief by a departure from its directions. Sudden emergencies could always be provided for by pursuing the course suggested. I think the plaintiff is entitled to have the verdict entered for him in pursuance of the reservation of my Brother Mellor.

*Mellor, Q.C.*, asked that the costs of the rule might be disallowed.

*Graham*, contrà, submitted that, inasmuch as an important question had been reserved by the judge for the opinion of the Court, there could be no reason why the ordinary rule should be departed from.

PER CURIAM. The defendant might have submitted to a verdict for 1*s*. Having caused the costs by resisting the rule, he must pay them.

*Judgment for the plaintiff.*

The defendant appealed.

1877

COOK v. WARD.

May 4. *Mellor, Q.C.*, and *Buszard, Q.C.*, for the defendant, contended that the cutting through the gateway was within the scope of the powers delegated by the board to the committee, and the committee had arranged amongst themselves in what manner they should act upon an emergency, therefore all three committee men acted in concert, and it was only the mere details and mode of acting which were delegated to the defendant.

*Lawrence, Q.C.*, and *Graham*, for the plaintiff, were not heard.

JAMES, L.J. I assent to the judgment of the Common Pleas Division. I agree with the reasoning of Lord Coleridge, C.J. It was not competent to the committee to delegate their powers to one of their number. If all three had agreed that it was necessary to cut the gateway, and two of them had told the third to cut it, then there might have been a justification for the act, but under the circumstances which have happened the defendant was not acting under proper authority.

BAGGALLAY and BRETT, L.JJ., concurred.

*Judgment affirmed.*

Solicitors for plaintiff: *Wright, Bonner, & Wright, for Bonner & Calthrop, Spalding.*

Solicitors for defendant: *Varley & Toynbee, for Toynbee, Larkin, & Toynbee, Lincoln.*

[IN THE COURT OF APPEAL.]

1877
*Feb.* 7;
*May* 7.

BESSELA *v.* STERN.

*Breach of Promise of Marriage—Material Evidence in support of Promise—32 & 33 Vict. c.* 68, *s.* 2.

In an action for breach of promise of marriage, the plaintiff having sworn that the defendant had seduced her and had repeatedly promised to marry her, her sister gave evidence that, at an interview she had with the defendant when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought upon the plaintiff, when he said "he would marry her and give her anything, but I must not expose him." The sister further stated that, after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant in the course of which the plaintiff said to the defendant, "You always promised to marry me, and you don't keep your word," when the defendant said he would give her some money to go away.

*Held*, reversing the judgment of the Common Pleas Division, that this was "material evidence in support of the promise," to satisfy the requirement of 32 & 33 Vict. c. 68, s. 2.

ACTION for breach of a promise to marry.

The cause was tried before Herschell, Q.C., at the last Liverpool summer assizes. The plaintiff gave evidence that she was a native of Berlin; in 1874 she went into the service of the defendant's father who kept an hotel in Liverpool, and whilst there was seduced by the defendant, who made her repeated promises of marriage. In June, 1875, finding herself with child, she, at the defendant's instigation, left the house of his father, and went into lodgings in Liverpool, where she was ultimately confined, and where she was visited by the defendant both before and after that event. The defendant paid for her lodgings, provided an accoucheur for her, and gave her small sums of money from time to time, and at length persuaded her to go to Germany, for which purpose he supplied her with money to the extent of 50*l.* or 60*l.* After remaining about four months in Germany, the plaintiff returned to Liverpool, and, the defendant repudiating the alleged engagement to marry her, she obtained an affiliation order of 4*s.* per week against him. In January, 1876, she brought this action.

In order to satisfy the requirement of 32 & 33 Vict. c. 68,

1877

BESSELA v. STERN.

s. 2 (1), Marie Bessela, the plaintiff's sister, was called. Her evidence was to this effect,—In May, 1875, I saw that the plaintiff was in the family way. I went to see the defendant. I said: "What have you done? You've got her into such disgrace. What do you mean?" He said he would marry her, and give her anything; but I must not expose him. I said: "I hope you'll do so." In July, 1875, I went to the defendant's office. He gave me 1*l.* to give my sister. I said: "What are you intending to do?" He said: "There's plenty of time to talk of that when that thing is born." I was at Mrs. Balmer's (where the plaintiff was confined) shortly after the birth of the child. Defendant came, and went into the parlour where my sister was. I could hear what they were saying. She said: "You always promised to marry me, and you don't keep your word." He said he would give her some money to go away. He said: "Why did not you make away with the little devil?" He parted in very bad temper.

The defendant, who was called as a witness, admitted the alleged connection and the paternity of the child, but positively denied that he had ever promised to marry the plaintiff.

Upon this and other evidence which is irrelevant to the present purpose, the case was left by the learned commissioner to the jury, who found a verdict for the plaintiff with 100*l.* damages. The commissioner declined to enter judgment for either party.

Feb. 7. *Torr, Q.C.*, and *Crompton*, moved for judgment for the plaintiff. The question is whether a promise made to a third person can be "material evidence in support of the promise" within 32 & 33 Vict. c. 68, s. 2. (1) The conversation deposed to by the sister to have passed between the plaintiff and the defendant on the second occasion surely was some evidence. The evidence of an accomplice is not received without corroboration; but the corroborative evidence need not be such evidence as would prove the commission of the crime. So, in cases under

(1) 32 & 33 Vict. c. 68, s. 2: "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

the bastardy law, although the words of 7 & 8 Vict. c. 101, s. 3, are nearly the same as those of the Act in question (1), it is not necessary, and indeed it would obviously be impossible, to obtain proof such as is suggested was requisite here. The materiality of the corroborative evidence must be judged by all the surrounding circumstances.

*Day, Q.C.*, and *Gully*, for the defendant. The evidence given by the plaintiff's sister clearly was not "material evidence in support of the promise;" at the most, it amounted only to a wild assertion by a man anxious to avoid exposure,—"He said he would marry her, and give her anything; but I must not expose him." How can that be material evidence in support of a previous promise to marry the plaintiff? It is a new promise made to a third person not in the plaintiff's presence. And as to the conversation between the plaintiff and the defendant overheard by the sister, it amounts only to an assertion by the plaintiff that the defendant had promised her marriage. The defendant's abstaining from contradicting the plaintiff's assertion was no corroborative evidence within the Act. It could hardly be expected that he would deny the statement at such a time. The words imputed to him on that occasion are certainly not the words of a man under an engagement to marry the woman he had seduced. This kind of evidence ought to be carefully watched: see Taylor on Evidence, 6th ed. § 1175, 1176.

*Torr, Q.C.*, was heard in reply.

GROVE, J. I am far from saying that this case is free from difficulty. The statute casts upon the judge the duty of determining what is material corroborative evidence in support of the testimony of the plaintiff herself that the defendant has promised to marry her. If the words of this Act had been, like those of the Bastardy Act, 7 & 8 Vict. c. 101, s. 3, "corroborated in some material particular by other testimony," then the case would have been brought within the words of the statute, because any evidence which must be left to the jury would fall within that description. But the words here are, "some other material evidence in support of such promise." There must be something more than a mere scintilla

(1) 7 & 8 Vict. c. 101, s. 3: "If the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices," &c.

1877

BESSELA v. STERN.

of evidence which would be admissible. Upon the best opinion I can form, I think the evidence in this case was not "material evidence in support of the promise,"—not the sort of evidence the statute requires. The evidence upon which the point really arises is that of the plaintiff's sister, which was to this effect:—"In May, 1875, I saw that the plaintiff was in the family way. I went to see the defendant: I said 'What have you done? you've got her into such disgrace. What do you mean?' He said he would marry her, and give her anything; but I must not expose him. I said 'I hope you'll do so.'" It does not appear that the witness was aware at that time that there had been any promise of marriage. That cannot be relied on as a new promise: it is given to a third person. Neither can it be said to be a corroboration of a previous promise to marry the plaintiff. She goes on,—"In July, 1875, I went to the defendant's office. He gave me 1*l.* to give my sister. I said, 'What are you intending to do?' He said, 'There's plenty of time to talk of that when that thing is born.'" Then comes the conversation between the plaintiff and the defendant deposed to by the sister, in which the plaintiff is represented to have said to the defendant, "You always promised to marry me, and you don't keep your word," to which the defendant replied that he would give her some money to go away,—adding, "Why did not you make away with the little devil?" That seems to me to be somewhat inconsistent with the first conversation. If he had promised before, one would have expected that he would have given a different answer when thus challenged. On the one hand, the defendant's abstaining from contradicting the plaintiff's assertion might be some evidence for the jury that he had made some promise; but, on the other hand, coupling it with the unfeeling remark about the child, it would seem to negative the idea of his ever having contemplated marriage. Taking it all together, I think it does not amount to "material evidence in support of the promise" such as the statute contemplates. It is capable of either interpretation. The Act must have meant something by the word "material." There is in these cases a strong interest in the woman to prove a promise; and therefore the legislature has thought fit to require that her evidence of the promise shall be corroborated "by some other material evidence in support of *such promise*." The

fact of the man saying nothing when taxed by the plaintiff with having given his word to marry her and failed to keep it, is clearly not sufficient. Each case must depend upon its own particular circumstances. It is impossible to lay down any precise rule. I think the defendant is entitled to judgment.

DENMAN, J. I am of the same opinion, though, I must say, not without having entertained very considerable doubt. The 32 & 33 Vict. c. 68, s. 2, for the first time makes the parties to an action for breach of promise of marriage admissible witnesses, with this proviso, that "no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." It is a negative clause: the words are strong, and every one of them is intended to have force. The plaintiff is not to recover unless her testimony is corroborated "by some other material evidence in support of such promise," that is, the promise sworn to by the plaintiff herself. In order to put a proper construction upon this statute, it will be useful to compare its language with that of any other analogous statute. In the case of an application to affiliate a bastard child, 7 & 8 Vict. c. 101, s. 3, enacts that, "if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child," &c. Those words have received a construction in a case of *Hodges* v. *Bennett*. (1) There, the application was not made until more than twelve months after the birth of the child, and the only evidence to give the justices jurisdiction was the unsupported testimony of the complainant that the defendant had paid money for the maintenance of the child within the twelve months; and the Court of Exchequer held that corroborative evidence of that fact was unnecessary. It was not necessary that there should be evidence in corroboration of the statement of the fact which gave jurisdiction: it was enough that the evidence as to the paternity of the party charged should be confirmed in some

(1) 5 H. & N. 625; 29 L. J. (M.C.) 224.

1877

BESSELA v. STERN.

material particular. That seems to me to be the common sense of the statute. Again, in the somewhat analogous case of the accomplice, it was for some time doubted whether there need be corroborative evidence on the question as to who committed the offence. It is now settled by competent authority that it must be corroborative evidence as to the commission by the prisoner of the crime charged. In such a case as the present, it cannot be doubted that it is for the judge to tell the jury whether or not the corroboration relied on constitutes evidence in support of the promise. Unless it is, it cannot be held to be corroborative testimony within the statute. In order to see whether or not the evidence is corroborative in that sense, the judge must look at all the surrounding circumstances. If there had been no other relation between the parties here than that suggested by the plaintiff, I am not prepared to say that I should not have considered that there was corroborative or material evidence fit to be left to the jury. But I think the evidence that was relied on was more consistent with another relation existing between them than that of marriage. Looking at all the circumstances, I agree with my Brother Grove that we cannot hold what was said to Marie Bessela to amount to a corroboration of the promise alleged to have been made to her sister. I therefore think the learned commissioner did right in leaving the plaintiff to move for judgment, and I have come to the conclusion, though not without doubt, that she is not entitled to it.

*Judgment for the defendant.*

The plaintiff appealed.

May 7. *Torr, Q.C.,* and *Crompton,* for the plaintiff.

The Court called upon

*Day, Q.C.,* and *Sutton,* for the defendant. There must be some substantial corroborative evidence in support of the promise. The whole conversation which is stated to have been overheard must be taken together. Then it amounts to no more than that the defendant said he would give the plaintiff money to go away.

[COCKBURN, C.J. I think this is a plain case, and the verdict

should have been for the defendant; but the question is whether there is confirmatory evidence of the promise. I think there is and that the Court below are wrong. It is not necessary to give such evidence as will prove the contract, but only confirmatory evidence of some part of it. If the jury do not believe the plaintiff's evidence that there was a contract, the confirmatory part of the evidence falls to the ground.]

The defendant did not deny what the plaintiff said to him, and it must be therefore admitted that it cannot be argued that there was no corroborative evidence; but the corroborative evidence must be of a substantial character, which this was not.

COCKBURN, C.J. I think the decision of the Court of Common Pleas must be overruled, as I am of opinion that there was sufficient corroborative evidence to support the promise. The evidence given in corroboration need not go the length of establishing the contract: if the evidence support the promise it is enough. Here the sister says that she overheard a conversation between the plaintiff and the defendant. She says she heard the plaintiff say, "You always promised to marry me, and you don't keep your word." To that the defendant makes no answer. It is true that he offered her money to go away, and it might be that a man might say, "What shall I give you to go away?" without having made any promise to marry; but, on the other hand, there is his silence, and from that silence the jury might come to the conclusion that he admitted the promise. I think the verdict is against the evidence, but I cannot say that there was no evidence to go to a jury corroborating the plaintiff's testimony.

BRAMWELL, L.J. I am entirely of the same opinion. The judgment of the Court of Common Pleas must be reversed, and I regret it, for I see the danger of holding there was evidence in corroboration of the promise. It is not too much to suppose that a woman under similar circumstances does sometimes fancy that a promise has been made to her, nor is it too much to suppose that she will sometimes find a sister or some one who will confirm her statement as to a promise having been made. The

1877

BESSELA v. STERN.

evidence was that the plaintiff said, "You always promised to marry me, and you don't keep your word." The defendant made no answer. If we were to hold that that was no evidence of a promise, we should get rid of a greal deal of evidence which is given every day at nisi prius. A claim is made on a man in respect of goods sold and delivered, and he does not deny it. If a statement is such that a denial of it is not to be expected, then silence is no admission of its truth; but if two persons have a conversation, in which one of them makes a statement to the disadvantage of the other, and the latter does not deny it, there is evidence of an admission that the statement is correct.

BRETT, L.J. The evidence is that the plaintiff made this statement to the defendant and he did not deny it. The whole question was left to the jury, and they believed the plaintiff. Similar evidence is received every day. The defendant by his silence admits what the plaintiff said, that the defendant always promised to marry her. It was not necessary that the evidence should shew a mutual promise to marry. The evidence need not prove a promise; all that is wanted is corroborative evidence of it.

*Judgment reversed, and entered for the plaintiff.*

Solicitor for plaintiff: *H. Sowton, Liverpool.*

Solicitor for defendant: *J. H. Lydall, for Stephens & Danger, Liverpool.*

## MACKLEY *v.* CHILLINGWORTH.

1877
*May 9.*

*Costs—Taxation between Party and Party—"Procuring Evidence"—Expenses of Surveying and Reporting upon Property forming Subject-Matter of Action—Witnesses qualifying themselves for Examination.*

No. 8 of the Special Allowances and General Provisions annexed to the Rules of the Supreme Court (Costs), which directs that "reasonable charges and expenses . . . . in procuring evidence . . . . are to be allowed," extends to the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice.

An action for the recovery of houses by reason of a breach of covenant to repair hem was referred to a special referee. Three surveyors were instructed by the plaintiff to survey the houses, and report upon their condition. At the hearing before the special referee the surveyors were called as witnesses, and the surveys and reports made by them were necessary for the proper conduct of the plaintiff's case. The plaintiff obtained judgment in the action with costs. Upon taxation of costs the master refused to allow as against the defendant the fees paid to the surveyors by the plaintiff for their surveys and reports, upon the ground that these fees could under no circumstances be recovered as between party and party:—

*Held*, that the decision of the master was wrong, and that the fees paid to the surveyors were proper to be taxed; for under No. 8 of the Special Allowances and General Provisions above-mentioned, the expenses of witnesses qualifying themselves for examination might be allowed.

THIS was an action to recover possession of certain houses, commenced on the 7th of December, 1875, under a power of entry for breach of covenant to repair; it had been referred to a special referee. At the hearing before him, three architects and surveyors, named respectively Bradbear, Reed, and Fletcher, were called, who deposed that they had made surveys, specifications, valuations, and estimates of the dilapidations, and gave evidence. The referee having made his award, Archibald, J., ordered that the plaintiff should be at liberty to sign final judgment for the recovery of the premises in respect of which the action was brought, and 135*l.* damages, "with costs of the action and of the reference and award herein to be taxed."

At the taxation the plaintiff's solicitor stated that the several surveyors called on the part of the plaintiff were material and necessary witnesses for the plaintiff, and it was absolutely necessary that they should be able to give a detailed account of all

1877
MACKLEY
v.
CHILLING-
WORTH.

the items of dilapidations, in order that the special referee might properly decide on the balance of evidence taken before him, whether the covenant to repair had at the date of the commencement of the action been complied with; and the witnesses had also to give an estimate and valuation of the cost of making good such dilapidations which remained to be done, in order that the damages might be properly assessed, and it would not have been possible to have produced such evidence unless the witnesses had made a careful and detailed examination and survey of every part of the premises. And in the bill of costs made out by the plaintiff's solicitor were contained the following items with reference to the expenses incurred by the employment of Messrs. Bradbear, Reed, and Fletcher:—

| | £ | s. | d. |
|---|---|---|---|
| 1. Instructing Mr. Bradbear to survey premises and value dilapidations | 1 | 1 | 0 |
| 2. Paid Mr. Bradbear for survey, valuation, and report | 15 | 15 | 0 |
| 3. Attending Mr. Bradbear on his survey, valuation, and report | 0 | 6 | 8 |
| 4. Letter and attendance on Mr. Reed, arranging appointment for his survey | 0 | 6 | 8 |
| 5. Attending, instructing Mr. Reed to survey and value dilapidations and report | 1 | 1 | 0 |
| 6. Copy abstract of lease for Mr. Reed | 0 | 5 | 0 |
| 7. Copy first schedule of dilapidations, prepared by Mr. Bradbear for Mr. Reed | 0 | 12 | 0 |
| 8. The like further schedule prepared by Mr. Bradbear | 0 | 15 | 0 |
| 9. Attending Mr. Reed on his report | 0 | 6 | 8 |
| 10. Paid his fee for survey, valuation, and report | 16 | 16 | 0 |
| 11. Instructing Mr. Fletcher to survey, value, and report | 1 | 1 | 0 |
| 12. Copy statement of claim for him | 0 | 3 | 2 |
| 13. The like schedule of dilapidations | 0 | 15 | 0 |
| 14. Attending Mr. Fletcher on his report | 0 | 6 | 8 |
| 15. Paid Mr. Fletcher for survey, valuation, and report | 27 | 6 | 0 |

| | £ | s. | d. |
|---|---|---|---|
| 16. Instructing Mr. Bradbear to make further survey and valuation, and report . . . . . | 0 | 13 | 4 |
| 17. Paid Mr. Bradbear for further survey, valuation, and report . . . . . | 5 | 5 | 0 |

The master disallowed the whole of the above items, on the ground that they represented the expenses of witnesses qualifying themselves for examination, and could under no circumstances be recovered as between party and party.

The plaintiff then took out a summons to shew cause why the master should not be at liberty to review the taxation of costs; but at the hearing Hawkins, J., referred the matter to the Court. The plaintiff thereupon gave notice of motion for an order in the terms of the summons above mentioned.

*W. Willis, Q.C.* (*H. B. Deane* with him), for the plaintiff, in support of the motion. It may be admitted that before the Supreme Court of Judicature Acts, 1873 and 1875, the items disallowed could not be recovered upon taxation between party and party in an action at common law, although sometimes the rule excluding from taxation the costs of witnesses qualifying themselves for examination was relaxed, as, for instance, in the case of an antiquary making translations of ancient records: *Duke of Beaufort* v. *Earl of Ashburnham*. (1) But the practice must now be governed by No. 8 of the Special Allowances and General Provisions annexed to the Rules of the Supreme Court (2), which is in effect taken from the Consolidated General Orders, 1860, of the Court of Chancery, Order XL., Rule 32, which in its turn is a mere repetition of the General Order, 1845, No. 120. (3) It is sub-

(1) 13 C. B. (N.S.) 598; 32 L. J. (C.P.) 97. *Gen. Hist. 822.*

(2) By No. 8 of the Special Allowances and General Provisions annexed to the Additional Rules of the Supreme Court (August 12, 1875), "As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses, are to be allowed."

(3) By the General Orders, 1845, Rule 120, of the Court of Chancery, "Where costs are to be taxed as between party and party, the taxing master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have

1877

MACKLEY v. CHILLINGWORTH.

mitted that the practice of the Court of Chancery under the orders cited must now be followed in all the divisions of the High Court of Justice, and that practice was to allow between party and party all costs necessarily incurred by the successful party in establishing his case. Thus, in *Smith* v. *Buller* (1), a fee of 7*l.* 7*s.* a day was allowed for a scientific witness, who had read up a case for the purpose of giving evidence upon it. In *Batley* v. *Kynoch* (2) the principle of allowing special remuneration to scientific witnesses was broadly adopted; and in *In re Charles Laffitte & Co.* (3) it was held that reasonable charges may be allowed for the employment of an accountant to examine and verify the books of a trader.

[LINDLEY, J. In *Churton* v. *Frewen* (4) the expenses of an antiquarian in deciphering and translating documents were allowed by Malins, V.C.]

*Philbrick, Q.C.* (*A. Cock* with him), for the defendant. Before the Supreme Court of Judicature Acts, 1873 and 1875, it was clearly established that the costs of witnesses qualifying themselves for examination could not be allowed upon taxation at common law. This principle is laid down in Gray on Costs, ch. lx., p. 502; 1 Chitty's Archbold's Practice, 516 (12th ed.); and in *Gravatt* v. *Attwood* (5) the costs of surveys, and in *Small* v. *Batho* (6) the costs of witnesses engaged in identifying the defendant, were disallowed. And the rule of taxation formerly followed at common law is still in force in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice, for by No. 28 of the Special Allowances and General Provisions

---

been properly incurred in . . . . procuring evidence by deposition or affidavit, and the attendance of witnesses. . . . But in allowing such costs, the taxing master shall not allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party."

The General Orders, 1845, were abrogated by the Consolidated General Orders, 1860, of the Court of Chancery; but Order XL., Rule 32, of the latter Orders contains identical provisions with those above set out.

(1) Law Rep. 19 Eq. 473.
(2) Law Rep. 20 Eq. 632.
(3) Law Rep. 20 Eq. 650.
(4) 15 W. R. 559. W.N. (1867) 101
(5) 21 L. J. (Q.B.) 215.
(6) 21 L. J. (Q.B.) 254.

annexed to the Rules of the Supreme Court (1) it is directed that the practice previously existing as to the taxation of costs is to remain in force, in so far as it is consistent with the Judicature Acts and the rules made in pursuance of them; and the former practice of the common law courts is not inconsistent with No. 8, relied upon by the plaintiff, for that extends only to the Chancery Division. Moreover, the decision in *In re Charles Laffitte & Co.* (2) turned merely upon the question whether the amount allowed was large enough: the principle involved was not really argued.

GROVE, J. The order that the master shall be at liberty to review his taxation must be made absolute. On behalf of the plaintiff it is admitted that before the coming into operation of the Supreme Court of Judicature Acts, 1873 and 1875, the practice in Courts of common law was not to allow, upon taxation between party and party, the costs of witnesses qualifying themselves for examination, that is, the expense of procuring information which might bear upon the matter in dispute; and it is very plain that the items to which this motion relates are of that description. But whatever the former practice may have been, we must look to the Judicature Acts and the rules made pursuant thereto for the principles now to be applied in taxing costs. I do not forget the provisions contained in No. 28 of the Special Allowances and General Provisions, which directs that the former procedure and practice as to costs of any Court whose jurisdiction has been transferred to the High Court of Justice are to remain in force, so far as they are consistent with the Judicature Acts and the Rules of Court made in pursuance thereof; but, in my opinion, No. 8 of the Special Allowances and General Provisions

(1) By No. 28 of the Special Allowances and General Provisions annexed to the Rules of the Supreme Court, "The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice and Court of Appeal."

(2) Law Rep. 20 Eq. 650.

1877

MACKLEY v. CHILLINGWORTH.

is inconsistent with the former practice of the common law Courts, and therefore abrogates it; for, as it is borrowed from the orders of the Court of Chancery without any substantial alteration, it must now receive the same interpretation which it did in that Court; the result is, that the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions are invested with the power of adopting a more liberal scale of costs than formerly.

It has been argued on behalf of the defendant that No. 8 of the Special Allowances and General Provisions is to be read as applying only to the Chancery Division; but it is not so directed in express terms, and therefore, in my opinion, No. 8 must apply to all the Divisions of the High Court of Justice; there is no difference between the jurisdiction, procedure, or practice of the several Divisions, except as to certain matters which have been expressly assigned to some of them principally by the Supreme Court of Judicature Act, 1873, s. 34. As I have already intimated, No. 8 of the Special Allowances and General Provisions is very similar in its terms to No. 120 of the General Orders, 1845, of the Court of Chancery; this was abrogated by the Consolidated General Orders, 1860; but at the same time identical provisions were substituted by Rule 32 of Order XL. Looking at the former procedure of the Court of Chancery in this respect, I can only come to the conclusion that it was intended to introduce it into all the Divisions of the High Court.

We have further to consider how this provision, relied upon by the plaintiff's counsel, is to be construed, and we have as to this the assistance and authority of decided cases. *In re Charles Lafitte & Co.* (1) may be perhaps explained upon the ground upon which the defendant's counsel has endeavoured to explain it; and it may be that in that case the question was not seriously considered, whether expenses of witnesses in qualifying themselves for examination can be allowed as a matter of principle; and that the only point really decided was whether the amount allowed was reasonable; but some of the authorities cited before us are decisive in favour of the plaintiff; and I especially allude to *Churton* v. *Frewen* (2); *Smith* v. *Buller* (3); *Batley* v. *Kynock.* (4)

(1) Law Rep. 20 Eq. 650.
(2) 15 W. R. 559.
(3) Law Rep. 19 Eq. 473.
(4) Law Rep. 20 Eq. 632.

To these decisions of the Court of Chancery we ought in any event to bow, because they are judicial expressions of opinion by a tribunal of co-ordinate jurisdiction with our own; but even without the aid of these authorities I should have come to the same conclusion. The provision itself is new as a rule of practice in this Division; and this circumstance of itself points out a wish on the part of its framers to alter the usage, which had previously been observed in taxation. Then the material words, "procuring evidence," are followed by the phrase "the attendance of witnesses," which is sufficient to cover the costs of subpœnaing witnesses and bringing them before the proper tribunal; therefore, according to the ordinary rules of interpretation, the words "procuring evidence" must mean something different from taking measures to compel a witness to give his testimony either vivâ voce or upon affidavit; and the reasonable construction is that it was intended to include the cost of witnesses preparing themselves for examination; the provision may likewise very well comprehend the expenses of bringing into court any article which it may be necessary to inspect, as, for instance, a broken wheel in an action for negligence in driving or in carrying a passenger.

The question upon taxation will be whether it has been reasonable to incur the costs claimed; here the point at issue was the condition of the demised premises in respect of repairs, and I think in the present case it will be proper to allow the expenses of the surveyors, if it has been essential to incur these charges for the determination of the matter in dispute; and it appears to me that the clause relied upon by the plaintiff reasonably applies to the facts before us. It follows, therefore, that the master was wrong in not taking into consideration whether it was reasonable to allow these costs. It may be quite right, in an action where the parties are poor and the value of the property in dispute is small, to disallow high fees paid to surveyors and heavy charges for plans and reports; but the expenses of surveyors are not to be disallowed as a matter of course, as has been done in the present action; very considerable costs in respect of surveys and reports may sometimes be allowed, if the nature of the action renders it necessary to incur them. I repeat that upon the mere words of No. 8 and No. 28 of the Special Allowances and General Provi-

1877

MACKLEY v. CHILLINGWORTH.

sions, I am of opinion that the costs claimed ought to have been taxed, and further that the decisions in Equity are clear authorities upon the question. The items brought before us must go back to the master to determine the proper amount to be allowed in the exercise of his discretion.

LINDLEY, J. Two questions present themselves for determination; first, whether the 8th of the Special Allowances and General Provisions applies to the Queen's Bench, Common Pleas, and Exchequer Divisions. I think it only necessary to look at its language to determine that question. The Rules of the Supreme Court, of which it forms a part, are of general application; they are signed by the judges as well of these three divisions as of the Chancery Division; where it is intended that they shall apply only to the Chancery Division, as for instance in the 17th and 20th of the Special Allowances and General Provisions, the intention of their framers is stated in express terms; this shews that where the operation of these rules is not expressly limited, it extends to all the divisions. Then it is to be recollected that this provision is borrowed from the practice previously existing in the Court of Chancery; for it is to be found in substantially the same shape in the General Orders, 1845, No. 120, and in the Consolidated General Orders, 1860, Order XL., Rule 32; and although the Supreme Court of Judicature Act, 1873, s. 25, subs. 11, providing that the rules of Equity are to prevail, does not include a matter of practice like this, still it is useful to recollect it as indicating the extent to which the application of equitable doctrines is intended to be carried.

The second question is, how is the provision before us to be construed? It is plain that the Orders of the Court of Chancery already mentioned have hitherto been interpreted in the manner now contended for by the plaintiff; and I am clearly of opinion that we ought to follow the construction of that Court in applying what is borrowed from its practice to the procedure of the High Court of Justice. I think it plain from the very language used that the words "procuring evidence" must not be confined to producing a witness or a document before the Court; and as we must depart from the principle formerly laid down in the Courts

1877

MACKLEY v. CHILLINGWORTH.

of common law, I see no reason why we should not go the full length of the decisions in equity; we ought not to run counter to them, and the rule laid down by them is that the wrongdoer shall bear all the costs necessarily incurred by the person injured in getting redress. I think that in proper cases even the cost of obtaining general knowledge and of reading a book may be allowed as between party and party. Moreover, apart from the question of authority, it seems to me that the wide construction hitherto prevailing in equity is upon principle correct. The items in respect of which this motion is made must go back to the master for re-consideration, and must be taxed at his discretion.

*Order absolute.*

Solicitors for plaintiff: *Carey, Warburton, & De Paula.*
Solicitor for defendant: *R. Voss.*

---

[IN THE COURT OF APPEAL.]

*Jan.* 19; *May* 4.

MELHADO AND LLOYD *v.* WATSON AND ANOTHER.

*Bankruptcy—Composition under s.* 126 *of the Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71)—*Statement by the Debtor of Creditor's Claim.*

Upon composition proceedings under s. 126 of the Bankruptcy Act, 1869, the names of the plaintiffs were inserted in the statement of the debtor produced at the meetings, as "Creditors claiming to hold security," and the amount of their claim was stated to be 94,000*l.* To this was appended a note: "Under legal advice, this claim was resisted, and became the object of an action and reference, which reference is now pending."

After the resolutions accepting a composition had been passed the award was made by the arbitrator, by which he found for the plaintiffs in the action, with damages 40*s.*, and, as to the matters in difference, that a sum of 3320*l.* was due to the plaintiffs. The plaintiffs having brought an action on the award, the defendant set up the composition resolutions as a defence:—

*Held*, reversing the judgment of the Common Pleas Division, that the above facts did not bring the case within s. 126, and consequently that the plaintiffs were not barred from proceeding at law to recover the full sums awarded.

DEMURRER to a statement of defence.

The following are the parts material to the point decided:—

Claim, 1. In 1872, the plaintiffs and Nathaniel Plant, since

1877

MELHADO v. WATSON.

deceased, commenced an action against the defendants in the Court of Common Pleas.

2. On the 11th of March, 1873, whilst the action was pending and there were certain other matters in difference between the parties, by an order of Bramwell, B., made by consent, the action and all matters in difference between the parties were referred to a barrister—the costs of the cause to abide the event, the costs of the reference and award to be in the discretion of the arbitrator.

5. On the 26th of July, 1875, the arbitrator duly made his award of and concerning the matters referred, and thereby awarded, amongst other things, as respects the action that he found for the plaintiffs with 40*s.* damages, and as respects a matter in difference secondly therein mentioned found, awarded, and determined, that there was, on the balance of the whole account, fairly and equitably due from the defendants to the plaintiffs 3320*l.*, and he adjudged and awarded that the defendants should pay that sum to the plaintiffs in cash; and he further awarded and determined that the defendants should bear and pay their own costs and half of the plaintiffs' costs of and incident to the reference, and that the defendants should also bear and pay the costs of the award, and if the plaintiffs in the first instance paid the costs of the award the amount so paid should be repaid to them by the defendants.

8. On or about the 10th of August, 1875, the plaintiffs' duly took up the award, and paid the arbitrator the costs thereof, amounting to 174*l.* 14*s.* 8*d.*

9. On the 3rd of December, 1875, the plaintiffs served the defendants with a copy of the award, and also demanded payment of the 174*l.* 14*s.* 8*d.*

11. The defendants have not paid the 3320*l.*, or the 174*l.* 14*s.* 8*d.*, or the 40*s.*, or half the plaintiffs' costs of the reference, or the costs of the action. The costs of the reference and action have been duly taxed; the half costs of the reference amount to 73*l.* 12*s.* 4*d.*, and the costs of the action to 28*l.* 10*s.* 6*d.*

Defence. 4. On the 9th of February, 1875, the defendants, who were then trading in partnership, being debtors unable to pay their debts, filed in the London Court of Bankruptcy their petition for the liquidation of their affairs by arrangement, and by an extraordinary resolution duly passed and confirmed at general meetings

of their creditors duly held on the 24th of February and the 8th of March respectively according to the Bankruptcy Act, 1869, it was resolved:—

(1) That a composition of 5*s.* in the pound shall be accepted in satisfaction of the debts due to the creditors from the said debtors:

(2) That such composition be payable as follows,—in four instalments, viz. 1*s.* in the pound at three months, 1*s.* in the pound at six months, 1*s.* in the pound at nine months, and 2*s.* in the pound at twelve months from the date of registration of this special resolution:

(3) That the security of the promissory notes of the debtors be given for each of the instalments, and that the notes to be accepted for the last instalment of the said composition be indorsed by Mr. R. Watson, of &c., millowner; and that such notes be accepted accordingly:

(4) That Thomas Kiss, John Beattie, and Albert James Atkey, be appointed trustees in the matter, to receive and distribute the composition.

5. The resolutions were registered on 24th of March, 1876.

5. a. In the statement of the defendants produced at the meetings, the names and addresses of the plaintiffs were thus inserted in the list of persons claiming to be creditors of the defendants:—

CREDITORS CLAIMING TO HOLD SECURITY.

| Names. | Addresses. | Amount of Claim. |
|---|---|---|
| Melhado, Alfred,<br>138 Finboro Road,<br>South Kensington. | Solicitor,<br>H. Phillips, Esq.,<br>3 King William Street,<br>Strand. | £ |
| Lloyd, David,<br>a/c Mr. Conyer,<br>31 Threadneedle Street. | | |
| Plant, Nathaniel,<br>a/c Thomas Shaw,<br>70 Bishopsgate Street. | | 94,000 0 0 |
| NOTE. Acting under legal advice, this claim was resisted, and became the object of an action and reference to J. H. Lloyd, Esq., which reference is now pending. | | |
| | From fo. 22 . . | 3,360 0 0 |
| | | £97,360 0 0 |

6. By reason of the claim of the plaintiffs being then unascertained and under reference, as mentioned in the plaintiffs' statement of claim, the defendants were unable to pay and did not

1877

MELHADO v. WATSON.

pay to the plaintiffs or to the said trustees the first two instalments or the promissory notes which became due respectively on the 24th of June and 24th of September, 1875.

12. The defendants have been always ready, and have frequently offered to pay the composition on the amount due to the plaintiffs under the award excepting the costs awarded, and to pay the costs in full; but the plaintiffs have refused to receive the same, sometimes alleging that they were not bound by the resolutions, and claiming to receive the whole of the amount awarded.

13. By reason of such delay and refusal of the plaintiffs the defendants were prevented from paying and did not pay to the plaintiffs or to the trustees the further instalment of the composition which became due on the 24th of December, 1875, which they were always ready and willing and offered to do.

16. The defendants deny the allegations contained in the eleventh paragraph of the statement of claim, and say that under the circumstances aforesaid it was wholly by the acts of the plaintiffs, and by their default, that the composition was not paid to them immediately on the making of the award so far as the same was then payable, and that the instalments which afterwards became due were not paid when the same became due respectively.

Demurrer, on the ground that, with respect to the composition resolutions it is not shewn that the plaintiffs' names, addresses, and debt were inserted as creditors in the statement of the defendants produced at the meeting at which the resolutions were passed, nor is it shewn that the defendants paid the composition or the promissory notes for the composition to their trustees; and the pendency of the arbitration did not prevent them from doing that; also that inserting the plaintiffs' names as claimants did not make the resolutions binding on them, especially as the notes for the amount of the composition on their claim were not given to the trustees, &c.

C. P. D.

Jan. 18. *Horace Brown*, in support of the demurrer. The question raised by this demurrer is whether the defendants can avail themselves of a defence founded upon a resolution for a composition under s. 126 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, under the circumstances set forth in the statement of defence.

Notwithstanding a resolution under that section duly passed and registered, it is competent to a non-assenting creditor to sue for his original debt where the debtor has failed to pay or tender the composition at the time agreed on, or within a reasonable time after: *Edwards* v. *Coombe* (1), followed by *Goldney* v. *Lording* (2), and adopted as law in *Ex parte Peacock* (3); *Re Hatton.* (4) In *Ex parte Paper Staining Co.* (5), a creditor refused to be bound by a resolution under s. 125 of the Bankruptcy Act, 1869, on the ground that his name was not duly inserted in the debtor's statement of debts, and that the composition had not been tendered to him within the prescribed time, and it was held that he ought not to be restrained from suing the debtor at law. In *Ex parte Ruffle* (6), a liquidating debtor was indebted to a creditor in 357*l.* recovered by a verdict at law, and costs which had not been taxed: the creditor attended the first meeting of creditors, and stated in his affidavit that the debtor was indebted to him in 357*l.* on the verdict and an amount of costs which he estimated at 200*l.*, and claimed to vote in respect of the aggregate amount: the creditor had been restrained by injunction from taking any further proceedings in the action: and it was held that the estimated amount of untaxed costs was an unliquidated debt within the Bankruptcy Act, 1869, s. 16, subs. 3 (7), and that he could not vote in respect thereof. The object of the provisions of s. 126 is, that every creditor shall have a voice at the meetings By s. 126 the composition is not to prejudice or affect the rights of any other creditor than those whose debts are inserted in the statement produced.

*Benjamin, Q.C*, for the defendants. The debtor files a petition for an arrangement by composition, and produces a statement of his debts and assets, and a resolution is passed that a composition shall be accepted by the creditors, and that composition has been paid. The plaintiffs made a claim for 94,000*l.*, which was disputed. It was a claim for unliquidated damages which it was impossible for

(1) Law Rep. 7 C. P. 519.
(2) Law Rep. 8 Q. B. 182.
(3) Law Rep. 8 Ch. 682.
(4) Law Rep. 7 Ch. 723.
(5) Law Rep. 8 Ch. 595.
(6) Law Rep. 8 Ch. 997.
(7) Subs. 3: "A creditor shall not vote at the said meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained."

1877

MELHADO v. WATSON.

C. P. D.

the debtor to estimate; and it was then under reference to an arbitrator. Rule 270 of the Bankruptcy Rules, 1869, which relates to proceedings for liquidation, provides that "all debts which would have been provable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings shall be provable under any such proceedings." Sect. 31 of the Act enacts that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy." It goes on, "save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy." "An estimate shall be made according to the rules of the Court for the time being in force, so far as the same may be applicable, and, where they are not applicable, at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value." "Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court, and the Court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and, upon such order being made, such debt or liability shall for the purposes of this Act be deemed to be a debt not provable in bankruptcy: but, if the Court think that the value of the debt or liability is capable of being fairly estimated, it may direct such value to be assessed, with the consent of all the parties interested, before the Court itself without the intervention of a jury, or, if such parties do not consent, by a jury, either before the Court itself or some other competent Court, and may give all necessary directions for such purpose; and the amount of such value when assessed shall be provable as a debt under the bankruptcy." Here, by consent of the parties, the amount of the plaintiffs' claim had before the commencement of the proceedings been referred to an arbitrator. The section goes on, "Liability shall for the purposes of this Act include any compensation for work or labour done, any

obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's-worth, whether such payment be, as respects amount, fixed or unliquidated, as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies, as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." It seems impossible to imagine a liability which is not there included. This, therefore, clearly was a claim which was provable under the composition.

[DENMAN, J. The question still remains, whether it was duly inserted in the statement of the debtors.]

By subs. 4 of s. 126, the debtor is to "produce to the meetings a statement shewing the whole of his assets and debts and the names and addresses of the creditors to whom such debts respectively are due." Paragraph 5. a. of the defence shews that the names and addresses of the plaintiffs were duly inserted in the debtors' statement. The amount of the claim was also inserted, with a note intimating that it was then under reference: and as soon as the amount became liquidated and ascertained by the award the composition was tendered to the plaintiffs. Where the claim is contingent, it is no part of the debtor's duty to make the estimate. It may be that it is the duty of the trustee. (1)

[DENMAN, J. *Ex parte Peacock* (2), seems to treat it as the duty of the debtor.]

The Court there were speaking of a claim for costs, which can be ascertained by taxation. *Campbell* v. *Im Thurn* (3) shews that the bankrupt is not to be affected by a breach of duty by the trustee. Can it be said that the debtor is in default when he has done all he could do to entitle himself to his discharge on payment of the composition?

(1) See subss. 3, 4, of s. 31. (2) Law Rep. 8 Ch. 682.
(3) 1 C. P. D. 267.

1877

MELHADO v. WATSON.

C. P. D.

Judgment, C.P.D.

[DENMAN, J., referred to *Ex parte King.* (1)]

*Horace Brown*, in reply. It is the duty of the debtor or of the trustee to make the estimate: the creditor has nothing to do with it.

*Cur. adv. vult.*

Jan. 19. DENMAN, J. This is a case of the first impression. No case was cited before me to shew that the precise point had ever before been raised: and I have now, so far as I know, to decide for the first time the meaning of s. 126 of the Bankruptcy Act, 1869, so far as it applies to the duty of the compounding debtor in making out the statement of the names and addresses of his creditors and the amount of the debts due to them. The action is brought by Melhado and Lloyd upon an award. It appears from the statement of claim that, in 1872, an action was commenced by the plaintiffs and one Plant against the defendants, and that in March, 1873, that action and all matters in difference between the parties were referred to an arbitrator, who on the 26th of July, 1875, made his award, giving the plaintiffs 40*s.* damages in the action, and finding that, as respects certain matters in difference between the parties, there was due to the plaintiffs 3320*l.* In August, 1875, the plaintiffs took up the award; and, the defendants not having paid the sums awarded against them or the costs, the present action is brought. The statement of defence alleges that on the 9th of February, 1875 (which was before the making of the award, but whilst the matters were pending before the arbitrator), the debtors filed their petition for liquidation by arrangement, and by an extraordinary resolution duly passed and confirmed at general meetings of their creditors, duly held on the 24th of February and the 8th of March respectively, according to the Bankruptcy Act, 1869, it was resolved that a composition of 5*s.* in the pound should be accepted in satisfaction of the debts due to their creditors, payable by instalments of 1*s.* at three, 1*s.* at six, 1*s.* at nine, and 2*s.* at twelve months. It then goes on to state that the resolutions were duly registered on the 24th of March, 1876 (which by the Act made them evidence that all had been done in accordance with the Act). It then goes on to state that in the

(1) Law Rep. 17 Eq. 332.

statement of the defendants produced at the meetings the names and addresses of the plaintiffs were inserted in the list of persons claiming to be creditors of the defendants, in respect of a claim for 94,000*l.*, which is explained in a note to be under reference to arbitration. It was contended by Mr. Brown, in the first place, that this was not a statement of a "debt," but only of a "claim:" but I intimated that inasmuch as the statute, when speaking of provable debts, uses the word "liability," and contemplates debts payable on a contingency as to time or amount, the argument was hypercritical, and that the mere use of the word "claim" would not prevent this from being a proper statement of a debt, if the debtors did insert it in the fair spirit and meaning of the Act. Then paragraph 6 states that, by reason of the claim of the plaintiffs being then unascertained and under reference, the defendants were unable to pay and did not pay to the plaintiffs or to the trustees the first two instalments of the composition or the promissory notes which became due respectively on the 24th of June and 24th of September, 1875. The real question is, whether, taking the whole statement as to the plaintiffs' debt together, it is a compliance with s. 126. The words of s. 126 are,—"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors, whose names and addresses and the amount of the debts due to whom are shewn in the statement of the debtor produced to the meetings at which the resolution is passed." It was contended that this was a provision expressly inserted to prevent any creditors being bound, except the persons whose names and debts are so stated that they could prove and vote. That is not perhaps an unreasonable view of the Act. But, upon the whole, I think, looking at the other provisions of the statute, and at Rule 270 (1), which applies the same interpretation as in bankruptcy, I think this was a statement of a debt which was provable, and the best statement the debtors could make of their actual liability to the plaintiffs. There can be no doubt that this liability was a debt

(1) Rule 270: "All debts which would have been provable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings shall be provable under any such proceedings."

1877

MELHADO v. WATSON.

C. P. D.

provable in bankruptcy. It was a debt which was not ascertained; but it was one which was so capable of ascertainment that Melhado and Lloyd and the defendants had referred it to arbitration; and it would be ascertained when the award was made. The fullest notice was given to the plaintiffs of what it was the debtors wished to be relieved from. It was in no degree misleading, and was in my judgment entirely in accordance with the spirit of the Bankruptcy Act.

It was then said by Mr. Brown that s. 31 of the Bankruptcy Act, 1869, which gives a description of the debts provable in bankruptcy, contemplates, in the case of debts and liabilities depending upon a contingency, that an estimate shall be made, according to the rules of the Court for the time being in force, "of the value of any debt or liability provable as aforesaid which, by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value;" and, that being so, it was impossible to say what the debt was, and what the plaintiffs were entitled to prove for. That argument certainly presents some difficulty: but, upon the whole, it does not I think prevent the defendants from having the benefit of the composition. All the provisions of the Act, whether with reference to bankruptcy or to composition with creditors, contemplate the proceedings being carried on under the control of the Bankruptcy Court. If it could be suggested that any injustice would be done which would prejudice the creditors, it was their duty to apply to the Court for redress, and not to lie by, and afterwards seek to take advantage of any indefiniteness in the statement to avoid being bound by the composition. I think the words of s. 126 are satisfied by the debtors doing the best they can in a case like this, —stating the claim and the pendency of a reference, and stating that for that reason they are unable to insert the correct amount of the debt. That being so, I am of opinion that none of the cases cited meet the present case: either they were cases where the instalments were left unpaid without any excuse, or cases where the name of the creditor had been altogether omitted. If the plaintiffs had any grounds of objection, they should have stated them at once. It appears to me that, not having moved

1877

MELHADO v. WATSON.

C. P. D.

the Court when the matter was defectively stated, but going on with the arbitration to its conclusion, they cannot now repudiate the composition on the ground that the original statement was irregular or untrue. I am of opinion that s. 126 is susceptible of this larger and more sensible construction. It may be that, in holding as I do, I may be thought to be somewhat stretching the words of the statute. I cannot say that I entertain no doubt upon the point. But, upon the best construction I can put upon it, I feel bound to hold that the statement of defence discloses a good answer to the action, if proved in point of fact.

The defendants must have judgment on the demurrer with costs.

*Judgment for the defendants.*

C. A.

The plaintiffs appealed.

May 4. *De Gex, Q.C.*, and *H. Brown*, for the plaintiffs.

*Benjamin, Q.C.*, and *Anstie*, for the defendants.

The arguments and cases cited were the same as in the court below.

Judgment, C. A.

JAMES, L.J. I am of opinion that s. 126 has no application to the present case. A composition under that section is a matter between a debtor and his admitted creditors. A debtor cannot be permitted to dispute a creditor's debt, and at the same time to compound for it: he cannot force the creditor to an arbitration and claim to pay him a composition as the result of that arbitration. Sect. 126, which provides that a non-assenting creditor shall be bound by the votes of other creditors, says that he is to be bound in certain events. These events must be shewn to have happened before he is bound. The section provides that "the composition accepted in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of debts due to whom are shewn in the statement of the debtor produced at the meeting" . . . "but shall not affect or prejudice the rights of any other creditor." That is, the debtor shall not be released from the debts of any other creditor. Why are we to depart from the plain words of the enactment? If the debtor wants the composition to be binding on the creditor, he must state

1877

MELHADO v. WATSON.

C. A.

the amount he admits to be due to the creditor. In the present case the debtors say 94,000*l.* is due as a claim, and they say that is a matter which is disputed and which is under arbitration. It appears to me impossible that s. 126 can apply to a case like the present, where the amount in which the instalments would have to be paid could only be ascertained many months after the composition has been accepted. It is of the essence of all these compositions that, in order to make them effective to bind the creditors, the composition should be paid exactly as if it was the payment of the debt. A debtor pays the composition upon his debts within two, three, or four months. The debtors here say they did not pay the composition from any fault of theirs, but because it was impossible for them to ascertain the amount for which they had to give promissory notes. That shews that the amount could not be brought within the composition clauses, and if that could not be, it is clear that the creditors could not be bound to accept the composition.

I am of opinion that the provisions of s. 126 do not apply to such a debt as this, and that the judgment should be reversed.

BAGGALLAY, L.J. The question raised by the demurrer is whether the resolutions passed at meetings held in February and March, 1875, are binding on the plaintiffs in this action. Whether this is so or not depends on the construction of s. 126. [The Lord Justice read the section.] It cannot be denied that the amount of the debt was not set forth in the statement, inasmuch as it was stated that "this claim was resisted, and became the object of an action and reference, which reference is now pending." It appears to me, therefore, that the terms of s. 126 have not been complied with, and that the demurrer should have been allowed.

BRAMWELL, L.J., concurred.

BRETT, L.J. I am of the same opinion. It seems to me that the composition clauses of s. 126 are clauses made in favour of the debtor, because the debtor is the only person who can originate the composition. It enables the debtor to ask for the indulgence

of his creditors. There is a further enactment in favour of the debtor, which is, that under certain circumstances if he can get some of his creditors to agree to a composition, he may bind those who are unwilling to agree. But in order to do that, he must bring the case of the unwilling creditor within the terms of s. 126. Now here the debtors have not brought the case of these unwilling creditors within the terms of s. 126, reasonably construed, because they have not put down the amount of the debt due to these creditors. Then it is urged by Mr. Benjamin that under s. 31 the amount of the debt can be ascertained. In the first place, I am of opinion that it could not be ascertained. There are no means by which it could be ascertained. Secondly, if it could, it has not been done. Therefore neither has the amount of the debt been ascertained, nor the amount of the debt inserted. The case of these creditors is therefore not brought within the terms of s. 126 so as to bind them, they being unwilling to be bound.

*Judgment reversed.* (1)

Solicitor for plaintiffs: *A. Pulbrook.*
Solicitor for defendants: *J. B. Batten.*

(1) See *Wilson* v. *Breslauer*, post.

1877
*May 7.*

[IN THE COURT OF APPEAL.]

RUMSEY *v.* NICHOLL.

*Exchange of Livings—Effect of Deed of Resignation—Action for the Recovery of Rectory House and Glebe—Insufficiency of Averments in Statement of Claim.*

In an action for the recovery of the rectory of L., the claim, after stating that the plaintiff was incumbent of L., and had in 1867 obtained permission from the patron to exchange livings with some incumbent to be approved of by the patron, and thereupon had entered into negotiations with P., incumbent of C., averred that the patron approved of the proposed exchange with P., and promised to do all things necessary on his part to enable P. and the plaintiff to carry out an exchange of their livings, and "relying on the promise, and for the purpose of carrying out the exchange, the plaintiff executed a deed of resignation of the living of L., and delivered the same into the hands of the registrar of the bishop. Before executing and delivering the deed of resignation the plaintiff had, with the sanction and the knowledge of the patron, requested and obtained from the bishop permission to exchange livings with P., and at the time of executing and delivering the deed the plaintiff explained fully and explicitly to the registrar his intention, and the object he had in view in executing and delivering the deed, and the registrar, on behalf of the bishop, accepted the deed to hold for that purpose only. And at the time of executing and delivering the deed, and before and after such execution and delivery, the bishop and the registrar and the patron knew well that the deed was executed and delivered by the plaintiff in reliance and consideration of the promise of the patron, and with full intention on the part of the plaintiff that if the exchange should happen not to be carried out the deed of resignation was to be held and become null and void to all intents and purposes whatsoever." That the patron of the living presented the defendant instead of P.:—

*Held*, affirming the judgment of the Common Pleas Division, that the statement of claim disclosed no title in the plaintiff, but shewed an absolute resignation by him of the living; for that it did not allege that the deed of resignation was executed and delivered by the plaintiff, and accepted by the bishop, upon condition that if P. were not presented to the living of L. the resignation should become null and void; and that the intention of the plaintiff in executing and delivering the deed was immaterial.

APPEAL from the judgment of the Common Pleas Division in favour of the defendant on demurrer to the statement of claim, ante, p. 179.

*M'Clymont*, for the plaintiff. The defendant objects to the statement of claim that it shews no cause of action. This objection

cannot be sustained. Paragraph 1 contains a statement of the plaintiff's title to the rectory of Llandough, paragraphs 2 and 3 that plaintiff requested permission from the patron of Llandough to exchange livings with some clergyman to be approved of by the patron; that the permission was granted; that plaintiff entered into negotiations with one Pinckney, incumbent of the living of Chilfrome; that the patron approved of the proposed exchange of livings, and promised to do all things necessary on his part to enable the plaintiff and Pinckney to carry out an exchange of their livings. Then paragraph 4 shews that the plaintiff did resign his living by apparently an absolute deed, which was delivered to the bishop's registrar, but the whole arrangement as to the exchange of livings was known to the bishop and his registrar, and the plaintiff's resignation of his living was conditional upon the exchange being carried out. It alleges that "before executing and delivering the deed the plaintiff had, with the knowledge of the patron, obtained from the bishop permission to exchange livings with Pinckney; that at the time of executing and delivering the deed the plaintiff explained explicitly to the registrar his intention, and the object he had in view in executing and delivering the deed, and the registrar, on behalf of the bishop, accepted the deed to hold for that purpose only," and then it avers "that the bishop and the registrar and the patron well knew that the deed was executed and delivered by the plaintiff in reliance and in consideration of the promise made by the patron in paragraph 3, and with the full intention on the part of the plaintiff that if the exchange should not happen to be carried out the deed of resignation was to be held and become null and void, and the plaintiff should have full liberty to remain in, or, if need were, re-enter on the possession and enjoyment of his living." That statement shews that the deed was delivered conditionally. The exchange of livings never took place, and therefore there was no resignation by the plaintiff of his living.

[BRAMWELL, L.J. The difficulty is that paragraph 4 does not state that the deed was delivered as an escrow; the utmost that it can mean is, that it was delivered as a deed with a parol condition.

COCKBURN, C.J. There is a further difficulty. Two things

1877

RUMSEY v. NICHOLL.

must concur; there must be a resignation of the living by the incumbent and an acceptance of that resignation by the bishop. If a conditional acceptance cannot exist at law, and the bishop has accepted the resignation conditionally, it is as if there had been no resignation. I think the question is, what is the meaning of paragraph 4?]

The meaning of paragraph 4 is, that the registrar on behalf of the bishop, has accepted the deed of resignation conditionally, that if the exchange is not carried out there should be no resignation by the plaintiff of his living.

All the cases shew, that until the exchange is fully executed by the admission, institution, and induction of both parties, the whole proceeding is void: Watson's Clergyman's Law, p. 28, cited in *Downs* v. *Craig* (1); Fitzh. Abr. Exchange, 10; *Lord Cromwell's Case* (2); *Colt* v. *Bishop of Lichfield* (3).

*W. G. Harrison, Q.C.*, and *Moulton*, for the defendant. The plaintiff has resigned his living and he has no cause of action; paragraph 4, states, "that the plaintiff executed a deed of resignation of the living of Llandough, and delivered the same into the hands of the registrar of the bishop." That is an absolute deed of resignation; what follows in paragraph 4 only states what was passing in the mind of the plaintiff, and with what object he executed the deed. If the plaintiff means to allege that the deed was delivered as an escrow, let him say so in plain terms and the defendant can then join issue; but the statements in paragraph 4 are so drawn that no issue can be joined on them.

[The Court suggested that paragraph 4 should be amended, and that it should be distinctly averred that the deed was delivered with a condition that it should be void if the agreement of exchange should not be carried out, such amendment to be made on payment of costs. The plaintiff's counsel declined to amend on such terms.]

*M'Clymont*, in reply.

COCKBURN, C.J. Our judgment must be for the defendant.

I own I entertained considerable doubt during the discussion,

(1) 9 M. & W. at p. 170. (2) 2 Rep. 74 *b*.
(3) Hob. 152; Owen, 12.

whether the allegation in paragraph 4 might not be sufficient to show that the bishop, or the bishop's officer, acting on behalf of the bishop, accepted this deed of resignation subject to the condition, that it was only to take effect if the exchange was carried out. But I agree with my two learned Brothers, that the allegation cannot be construed so as to have this meaning. A resignation may be absolute or it may be conditional. Here the deed is positive and absolute and contains no condition. The plaintiff cannot be heard to allege that the deed was conditional, when by its terms it is absolute. Then it occurred to me, in the course of the discussion, that the terms and effect of the deed were one thing, but that to constitute a valid resignation, something more than the mere resignation on the part of the party so delivering the deed is necessary. It is necessary that the resignation shall be accepted by the ecclesiastical authorities, without whose acceptance the resignation does not take effect, that is to say, there must be an acceptance of the resignation on the part of the bishop. I cannot but think—though it is not absolutely necessary to the decision—that if the bishop, instead of taking the resignation absolutely, as it appears to be by this deed, were, at the instance of the party delivering it, to accept it subject to a condition—for instance to such a condition as the plaintiff now insists on, that the resignation should be accompanied by an exchange of livings—unless that exchange took place, the resignation would become null and void. If that condition extrinsic to the deed had been insisted on by the plaintiff proposing to resign, and the bishop and his officer had accepted the resignation subject to the condition, then I think, although the deed might be a deed of absolute resignation, it would be a conditional acceptance of the resignation on the part of the bishop; and, consequently, if the condition failed to be fulfilled, the resignation would be inoperative.

If that had been distinctly alleged in the statement of claim, I should have thought it deserving of very serious consideration. But when we come to look at the statement of claim, it seems to me to amount to no more, or to very little more than this—for it is very ambiguous—that the plaintiff did explain to the registrar what his object was in resigning, and that unless the terms were

1877

RUMSEY v. NICHOLL.

carried out the deed was not to take effect. It is not sufficiently stated that the resignation was accepted on those terms. That is the most material part of the case, because the deed of resignation being absolute must take effect absolutely, unless it can be shewn that the acceptance of the resignation was subject to a condition—and unless that is distinctly stated we have a resignation made absolutely. The plaintiff might amend paragraph 4 by a more clear statement, but he does not think it worth his while to have that advantage. Judgment will, therefore, be given for the defendant on the demurrer.

BRAMWELL, L.J. I am entirely of the same opinion. I concur in the doubt stated by the Lord Chief Justice. I think if we were to interpret these words as having the meaning which has been suggested by him, it would shew either that this deed was delivered as an escrow or that the acceptance was conditional, or that the bishop did not accept it, but promised he would accept it at a future time and on a certain event happening. But I do not think that is the meaning of the words.

BRETT, L.J. The deed is in form an absolute resignation. I think there is no statement in this statement of claim which can be construed as an allegation that the deed was delivered as an escrow. I will for the moment assume, that evidence might be given as to the fact of an agreement between the plaintiff and the registrar, that the deed was delivered subject to a condition. I doubt, however, if such evidence were given and it was shewn that the registrar did accept the deed subject to the condition suggested, that that would have any effect against the defendant. Assuming this, I am of opinion that the allegations in paragraph 4 of this statement of claim do not allege that the deed was ever offered by the plaintiff to the registrar, or accepted by the registrar at the time it was delivered, subject to any such condition as has been suggested. It seems to me that not only does the statement fail in that respect, but that it is drawn in a form which shews that whoever drew it doubted much whether, if he had stated it more explicitly, he could possibly have proved it. Paragraph 4 states what took place at the time of the delivery of the deed, and

merely says that the plaintiff made a statement, that is, he explained then fully and explicitly his intention and the object he had in view in executing and delivering the deed. It is obvious his intention was that it should be a first step towards an exchange. The whole of that allegation might be proved by shewing that the bishop had given permission to exchange, and therefore he must know that the deed was to be delivered as the first step, and that the plaintiff then so stated it to the registrar, and he accepted it for that purpose. Then it goes on to state something which at the time was in the mind of the plaintiff, which was stated to be known to the registrar; but it carefully abstains from saying that that intention or desire of the plaintiff was then stated, and it is certainly equally clear that it abstains from alleging that the registrar accepted the deed and resignation on those conditions. I apprehend the reason is obvious, that it is known to everybody that this is the mode of carrying out a change of livings, and the only way in which it can be effected is that the deed must be delivered unconditionally; and if therefore the statement of claim alleged that the registrar accepted it conditionally, the plaintiff knew he could not have proved the registrar accepted it conditionally, because the registrar had no power to accept the resignation conditionally.

*Judgment affirmed.*

Solicitors for plaintiff: *Lee & Pemberton.*
Solicitors for defendant: *Maples, Teesdale & Co.*

1877
May 3.

## ROE *v.* HAMMOND AND ANOTHER.

*Sheriff—Fieri Facias—Poundage—Discharge Fee—Levy Fee—1 Vict. c. 55, s. 3.*

If a sheriff, who has seized pursuant to a writ of fi. fa. the goods of an execution-debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods.

The goods of the defendants were seized by the sheriff of M. under a writ of fi. fa. issued at the suit of the plaintiff, and afterwards a similar writ in an action by I. against one of the defendants was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment-debts was paid on behalf of the defendants, and no part of the goods seized was sold. The sheriff claimed and received payment of a discharge fee in each action, and in the action at the suit of I., poundage and a levy-fee. A rule was obtained under 1 Vict. c. 55, s. 3, for a return of these fees and the poundage:—

*Held*, that the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees and the levy fee.

A RULE had been obtained under 1 Vict. c. 55, s. 3 (1), calling upon the sheriff of Middlesex, and F. Tayler and C. Tayler, his

(1) 1 Vict. c. 55, is intituled "An Act for better regulating the fees payable to sheriffs upon the execution of civil process:" and enacts by s. 2, that "from and after the passing of this Act, it shall be lawful for sheriffs or their officers, concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time to time be allowed by any officer of the several courts of law at Westminster, charged with the duty of taxing costs in such courts, under the sanction and authority of the judges of the said courts respectively."

Sect. 3. "Any sheriff, officer, or minister, acting in the execution of process directed to any sheriff or sheriffs, or engaged or concerned therein, who shall extort, demand, take, accept, or receive from any person or persons any fee or fees, gratuity, or reward not allowed as aforesaid, or greater in amount than as allowed as aforesaid, such sheriff, or other his officer, or minister, upon complaint thereof made against him to any of the said courts, and on proof being made thereof upon oath, either by the examination of witnesses vivâ voce, or on affidavits, or on interrogatories, to the satisfaction of the court to which the said complaint shall be made, that such sheriff, officer, or minister, as the case may be, hath offended therein as aforesaid, then and in such case every such sheriff, officer, or minister, as the case may be, shall be adjudged guilty of a contempt of such court, and punished by such court accordingly."

In the "Table of Fees to be taken by the sheriffs, under-sheriffs, deputy-sheriffs, sheriffs' agents, bailiffs, and others, the officers or ministers of sheriffs in England and Wales, pursuant to the statute of 1 Vict. c. 55," the following items occur: "To the bailiffs for executing warrants on . . . fi. fa. . . . 1*l.* 1*s.* For the release . . . of any goods taken in execution, 4*s.* 6*d.*"

officers, and W. Furber & R. Price, to shew cause why they should not return to the defendants in this action, E. W. Hammond and W. Hammond, the following sums of money taken in excess, namely, 1*l.* 1*s.* for costs of an interpleader summons and 4*s.* 6*d.* for a discharge fee, and also unto W. Hammond, the following other sums of money taken in excess in an action in the Exchequer Division between H. Ikin and W. Hammond, namely, 1*l.* 1*s.* for levy fee, 15*s.* for poundage, and 4*s.* 6*d.* for a discharge fee, and unto E. W. Hammond and W. Hammond the further sum of 5*l.* 5*s.*, taken in excess in both actions for auctioneers' attendances.

The following were the material facts stated in the affidavits:

A writ of fi. fa. in this action indorsed to recover a judgment debt of 80*l.* 1*s.* 9*d.*, having been lodged with the sheriff of Middlesex, he upon the 15th of March, 1876, granted his warrant to F. Tayler and C. Tayler, who upon the 16th of March seized and took the goods of the defendants, E. W. Hammond and W. Hammond. Upon the 17th of March, Furber & Price, who carried on business as auctioneers in partnership, were instructed on behalf of the sheriff to proceed to a sale to realise the amount of the judgment, and thereupon they prepared a draft catalogue or inventory. Upon the 18th of March, a notice signed by W. W. Read was served upon the sheriff, which claimed under a bill of sale the goods seized by him; an interpleader summons was taken out by the sheriff, and was ultimately adjourned to the 25th of March. Upon the 20th of March a writ of fi. fa. in *Ikin* v. *Hammond* indorsed to recover a judgment debt of 13*l.* 10*s.* was lodged with the sheriff of Middlesex, and thereupon he granted his warrant to F. Tayler and C. Tayler, to seize the goods of the defendant, W. Hammond. Furber & Price were directed to realise the amount thereof. Upon the 25th of March Read called at the office of the two Taylers, and stated that he had come for the purpose of paying the amount of the judgment debt and costs in the present action. He was referred to Furber & Price, and accordingly proceeded to their office. There was a conflict of testimony as to what passed after he reached their office. Read stated that he saw both Furber and Price, and told them that he had come to pay the debt and costs in the present action; they then informed him that they had an execution in the action of *Ikin* v. *Hammond* which

1877

ROE v. HAMMOND.

must be paid before the sheriff could withdraw: he thereupon paid them the amount of the judgment debts, costs, and expenses in the two actions amounting to the sum of 113*l.* 16*s.* 9*d.* (1), and this amount included the items in respect of which the above-mentioned rule had been obtained. Read objected to the charge of 1*l.* 1*s.* for the interpleader summons in this action, and also to the charge of 5*l.* 5*s.* for auctioneers' attendances; but Price said that 113*l.* 16*s.* 9*d.* was the amount they required and they would not take less.

According to the affidavit of Furber and Price, the latter was not present when Read called to pay the amount of the execution in this action; and Furber stated that he informed Read, that although the charge of 1*l.* 1*s.* for the interpleader summons could not be insisted upon, yet Read ought to pay it, because it was incurred through his making a claim which he could not sustain, and thereupon Read made no objection to paying it or the charge of 5*l.* 5*s.* for auctioneers' attendances. The defendants afterwards repaid the sum of 113*l.* 16*s.* 9*d.* to Read. No part of the goods seized was sold by the sheriff.

*Alfred Cock*, for Furber & Price, shewed cause. First, it is submitted that, even if extortion was committed by Furber, Price is not liable under this rule. The affidavits shew that Price was not present when the executions were paid out; and as this is a penal proceeding, one partner is not responsible for the wrongful acts of another. Secondly, the levy fee in *Ikin* v. *Hammond* was rightly taken, for after the writ of fi. fa. in that action had been delivered to the sheriff, he remained in possession of the defendants' goods four or five days. Thirdly, the fee of 5*l.* 5*s.* is not allowed in the Table of Sheriff's Fees, and therefore primâ facie ought not to have been taken; but the affidavits shew that it was paid voluntarily, and not upon compulsion, and therefore it cannot be recovered back. Fourthly, the discharge fee was properly payable in each action, the goods having been released without sale. Fifthly, the sheriff was entitled to poundage, the amount of the judgment-debts having been recovered by virtue

(1) This sum included a charge for poundage in the present action; but as to this no objections were made on behalf of the defendants.

of the writs; and this is sufficient to entitle him to poundage: *Alchin* v. *Wells*. (1) Sixthly, the cost of the interpleader summons was not, perhaps, strictly payable; but as it was incurred by reason of a claim put forward by Read, the Court, in the exercise of its discretion, will not order it to be repaid.

*G. Pitt Lewis* (*Talfourd Salter, Q.C.*, with him) for the defendants, supported the rule. First, in *Ikin* v. *Hammond* there was no levy upon the defendants' goods: *Nash* v. *Dickenson* (2), and therefore no fee was payable in respect thereof. Secondly, the discharge-fees were illegally exacted; fees of this kind are payable only when goods have been seized and released without payment of the judgment-debt. Thirdly, in any point of view the charge for poundage was 1*s.* too much in *Ikin* v. *Hammond*, but it is submitted that none was payable. [He was then stopped.]

LORD COLERIDGE, C.J. This is an application under 1 Vict. c. 55, s. 3, to compel the sheriff of Middlesex and his officers and assistants to return certain sums of money extorted by them in levying the amount of the judgment-debt in two actions—*Roe* v. *Hammond and Another* and *Ikin* v. *Hammond*. As different considerations apply to the amounts claimed, it is necessary to mention them separately. Although the sums in dispute are small, yet the matter is of importance, for it is always necessary to watch carefully the proceedings of sheriffs and their officers, and persons whose goods are seized in execution are to some extent helpless and are very much exposed to extortion. It was the object of the legislature, in passing the statute which I have mentioned, to protect execution-debtors from oppressive acts committed by sheriffs and their officers.

It has been argued on behalf of Price, that upon the facts stated in the affidavits it must be taken that the extortion, if proved, was committed by Furber alone, and that this proceeding being of a penal nature, Price is exempt from responsibility. The affidavits do not satisfy me that Price was not perfectly aware of the acts complained of at the time when they were committed; therefore he is liable to be punished under this rule if any extortion

(1) 5 T. R. 470. (2) Law Rep. 2 C. P. 252.

1877

ROE v. HAMMOND.

has been committed. I may say, however, that in my view, even if Price had not been present when the amount of the judgment-debts was paid by Read, I should think him equally responsible with Furber—for they were partners, and the alleged wrong was committed in the transaction of the business of the partnership.

I will deal first with the levy fee in the action of *Ikin* v. *Hammond.* It has been objected that there was no levy; but I think, upon the facts stated in the affidavits, there was clearly a levy. The writ of fi. fa. was lodged with the sheriff on the 20th of March, and the amount of the judgment-debt was paid on the 25th; he had been meanwhile in possession of the goods belonging to the execution-debtor, and I do not think it material that he had originally seized them under another writ. The possession by the auctioneers of the goods seized was a possession under the writs of fi. fa. in both actions. If what was done in *Ikin* v. *Hammond* does not constitute a levy, it is difficult to say what does amount to it. I think, therefore, that there must be judgment for the sheriff and his officers as to the levy fee.

It has been admitted that the sum of 5*l.* 5*s.* for auctioneers' charges not being allowed in the table of fees, was improperly taken if it was exacted against the will of the defendants. It has been contended, however, that it was paid by Read without objection, and therefore must be regarded as a voluntary payment; if this were so, it could not be recovered back; but upon the affidavits I am of opinion that it was paid under protest and upon compulsion; this sum of 5*l.* 5*s.* must therefore be returned.

As to the sum of 4*s.* 6*d.* taken in each action for a discharge fee, it has been contended for the defendants that it was not payable, because in *Ikin* v. *Hammond* there was no levy, and in *Roe* v. *Hammond and Another* poundage was payable; but, as I have already stated, it seems to me that there was a levy in *Ikin* v. *Hammond,* and, for the reasons which I shall presently give, poundage could not be lawfully taken in either action. Now, when there has been a levy and yet no poundage is payable, a discharge fee may be lawfully and properly taken; it was so laid down by Jervis, C.J., with the consent of the other members of the Court

of Common Pleas in *Masters* v. *Lowther*. (1) The sheriff, therefore, was entitled to receive the discharge fee in each action, and there must be judgment for him as to the amount thereof.

As to the question raised by the charge of 15*s*. for poundage, it is unnecessary to determine whether more was taken than was due, even if the case made for the sheriff were correct, for we are of opinion that none could be exacted. Upon the facts before us there was in each action a levy but no sale, the execution having been paid out on behalf of the debtors. We think that seizure without sale gives no right to poundage. The practice of the courts seems to have varied in this respect. So far back as the time when Lord Mansfield was Chief Justice of the King's Bench it was said, upon inquiry into the practice of that court, that "the sheriff cannot have poundage till the goods are sold," Lofft, p. 433; and this appears to have been laid down as a rule of universal application. But it has been urged that *Alchin* v. *Wells* (2) shews that the sheriff, who seizes the goods of an execution-debtor under a writ of fi. fa., may be entitled to poundage, although there has been no sale; in my opinion, however, the facts at least of that case do not support this contention. In *Alchin* v. *Wells* (2) the goods of the defendant had been seized under a fi. fa., before sale the parties to the action compromised, but the sheriff, before quitting possession, satisfied himself for poundage. The plaintiff ruled the sheriff to return the writ, and thereupon a rule was obtained to discharge the plaintiff's rule. The Court of King's Bench held that as the parties had compromised, neither of them could compel the sheriff to return the writ of fi. fa., and made absolute the second rule for discharging the rule against the sheriff. This is all that was decided in the case, which is very briefly reported. It is true that the Court is reported to have said that "the sheriff, who had levied under the writ, was unquestionably entitled to his poundage;" but I think at most this can only be taken as obiter dictum; for the question as to the sheriff's right was not strictly before the Court. The decision, therefore, does not warrant the conclusion drawn from it in Watson on the Office of Sheriff, c. 5, s. 5, p. 111 (2nd ed.). The

(1) 11 C. B. 948, at p. 953; 21 L. J. (C.P.) 130, at p. 132.
(2) 5 T. R. 470.

1877

ROE v. HAMMOND.

reasoning in *Alchin* v. *Wells* (1) was commented upon by the Court of Exchequer in *Rex* v. *Robinson* (2), and the view which I take was substantially adopted by Parke, B. It follows that the sheriff is entitled to poundage only in respect of the amount actually realised by the sale of goods seized, for in that case it is obtained through his instrumentality. In *Chapman* v. *Bowlby* (3) Lord Abinger, C.B., and Parke, B., appear to have considered that *Alchin* v. *Wells* (1) supported the doctrine that poundage was payable, although the parties to the action compromised without a sale; but their remarks were not necessary to the decision of that case, and moreover are quite inconsistent with the observations of Parke, B., in *Rex* v. *Robinson*. (2) The real question in *Chapman* v. *Bowlby* (3) was whether the second execution there levied was regular, and the question as to the right to poundage was only collateral. It follows, therefore, that as there was no sale the sheriff was not entitled to poundage; the judgment debt was not levied according to the exigency of the writ. (4)

The charge of 1*l.* 1*s.* for an interpleader summons cannot be maintained; in fact, it has scarcely been seriously argued that the sheriff is entitled to it. The result is that the sheriff can keep the levy fee of 1*l.* 1*s.* and the discharge fees of 4*s.* 6*d.* each; the other sums must be returned to the defendants.

GROVE, J. I am of the same opinion. In *Sneary* v. *Abdy* (5) the question as to the sheriff's right to poundage did not directly arise: the point in dispute was whether the sheriff could, without instructions from the execution-creditor, sell a portion of the goods seized in order to satisfy his possession-money, fees, and expenses, the execution-creditor having become disentitled to recover the judgment-debt: as to this there was difference of opinion upon the bench; my Brother Cleasby thought the sheriff could sell, my Brother Field and myself thought he could not.

(1) 5 T. R. 470.

(2) 2 C. M. & R. 334.

(3) 8 M. & W. 249.

(4) By a writ of fi. fa. (Supreme Court of Judicature Act, 1875, Appendix F. 1) the sheriff is commanded that "of the goods and chattels" of the execution-debtor he "cause to be made" the amount of the judgment-debt: the form of the writ requires that the judgment shall be satisfied by means of a sale, and does not contemplate payment by or on behalf of the debtor.

(5) 1 Ex. D. 299.

It was, therefore, unnecessary to consider the right to poundage: but as one of the judges who decided the case, I may say that we all were of opinion that the right to poundage depended upon an actual levy of the debt. (1) The words of 29 Eliz. c. 4 (2), are very strong to shew that the right of the sheriff to poundage is dependent upon an actual sale, and Lord Ellenborough in *Bilke* v. *Havelock* (3) said: "If the goods are sold, he receives in poundage the specific recompense for his trouble which the law has provided." This plainly implies that without a sale the sheriff has no right to poundage.

As to the question raised as to the liability of Price, I think that the affidavits are unsatisfactory, and therefore that he is equally liable with Furber: but I incline to think that he would be liable under this rule without actual knowledge of the extortion; for they were partners, and the wrongful act was committed in the course of the partnership business.

LINDLEY, J. I agree with the conclusions at which the Lord Chief Justice and my Brother Grove have arrived. But, speaking for myself, I may say that I should hesitate to hold as matter of law that under this rule Price would, without actual knowledge on his part, be responsible for the acts of Furber; for there may be a difference between civil liability and a penal proceeding; but I decide against Furber upon the affidavits. The rule must be

(1) See per Field, J., in *Sneary* v. *Abdy*, 1 Ex. D. 299, at pp. 306, 307.

(2) 29 Eliz. c. 4, is intituled "An Act to prevent Extortion in Sheriffs, Under-Sheriffs, and Bailiffs of Franchises or Liberties, in cases of Executions," and enacts that "it shall not be lawful . . . to or for any sheriff, undersheriff, bailiff of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs or deputies, nor for any of them, by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more or other consideration or recompense than in this present Act is and shall be limited and appointed, which shall be lawful to be had, received, and taken, that is to say, twelve pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds, and sixpence of and for every twenty shillings, being over and above the said sum of one hundred pounds, that he or they shall so levy or extend and deliver in execution, by virtue and force of any extent or execution whatsoever."

(3) 3 Camp. 374.

1877

ROE v. HAMMOND.

made absolute to return the costs of the interpleader summons in *Roe* v. *Hammond and Another*, and the poundage in *Ikin* v. *Hammond*, and the auctioneers' expenses in the two actions; and the costs of this rule must be borne by all the parties against whom it was obtained.

*Rule absolute accordingly.*

Solicitor for Furber & Price: *A. O. Underwood.*
Solicitor for defendants: *F. Norton.*

---

*June 7.*

## WHITE *v.* FRANCE.

*Negligence—Licensee—Invitation—Concealed Danger.*

A barge of the defendant being unlawfully navigated on the river T., the plaintiff, a waterman, complained to the man in charge, who referred him to R., the defendant's foreman; the plaintiff went to the defendant's wharf in order to speak to R., and whilst he was there a bale of goods, by the negligence of the defendant's servants, fell upon him and injured him; the plaintiff had had no warning that the bale might fall:—

*Held*, that the plaintiff was entitled to maintain an action for the injury sustained by him.

*Corby* v. *Hill* (4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318) and *Indermaur* v. *Dames* (Law Rep. 1 C. P. 274; and on appeal, Law Rep. 2 C. P. 311) followed.

THIS was an action tried before the deputy judge of the county court of Surrey held at Southwark. The plaintiff claimed to recover damages for an injury sustained by him through the alleged negligence of the defendant's servants. The facts are set out in the judgment of the Court, and in addition thereto it is only necessary to mention the following circumstances:—

At the trial it was admitted that the plaintiff's only interest in complaining of the navigation of the barge was that it was illegal, and it was also admitted that he wanted to get employment from the defendant; it was further proved that it was customary for lightermen to tender their services, when a barge of above fifty tons burden was navigated on the Thames by one man only. The defendant was the occupier of a wharf in Tooley Street, Southwark, where the accident happened.

The deputy judge of the county court asked the jury, first,

1877

WHITE v. FRANCE.

whether there had been an invitation to the plaintiff to go to the defendant's wharf; secondly, whether the defendant's servants had been guilty of negligence; thirdly, whether the plaintiff had been guilty of contributory negligence. The deputy judge told the jury that these three questions must be found in the plaintiff's favour before he could be entitled to a verdict; and, further, that if the plaintiff went on the defendant's wharf merely on his own business, without any invitation, the defendant was not responsible. The jury found a verdict for the plaintiff for 35*l.* damages.

An order for a new trial was obtained on the ground that there was no invitation to the plaintiff, and that the plaintiff at the time of the alleged negligence of the defendant was a bare licensee; and on the ground of misdirection by the deputy judge, in not telling the jury that there was no concealed danger at the defendant's wharf, and that the peril, if any, was apparent and known by the plaintiff.

April 27. *Kemp, Q.C.*, shewed cause.

*R. A. McCall* supported the order.

The following authorities were cited: *Scott* v. *London and St. Katherine Docks Co.* (1); *Toomey* v. *London, Brighton, and South Coast Ry. Co.* (2); *Wilkinson* v. *Fairrie* (3); *Holmes* v. *North Eastern Ry. Co.* (4)

*Cur. adv. vult.*

June 7. The judgment of the Court (Denman and Lopes, JJ.) was delivered by

DENMAN, J. In this case the facts were as follows:—

The plaintiff, a licensed waterman, was on the day before the day in question waiting for employment. According to a rule of the Thames Conservancy Board, barges of over fifty tons burden ought to have two men employed to work them. The defendant's barge had been used with one man only, and the plaintiff went to complain to the person in charge; he was referred to one Recknell, the defendant's foreman, who would be there the next day. On

(1) 3 H. & C. 596; 34 L. J. (Ex.) 220. 11 Jur. N.S. 204

(2) 8 C. B. (N.S.) 146; 27 L. J. (C.P.) 39.

(3) 1 H. & C. 633; 32 L. J. (Ex.) 73.

(4) Law Rep. 4 Ex. 254; on appeal, Law Rep. 6 Ex. 123.

1877

WHITE v. FRANCE.

the next day he was going to see Recknell, and was walking towards him on the defendant's premises, when a bale of goods, which had been, as the jury found, negligently left by the defendant's servants nicely balanced at the edge of the warehouse trap-door, from which such bales are lowered, suddenly fell upon the plaintiff and injured him.

Under these circumstances we think the verdict for the plaintiff was warranted by the authority of *Corby* v. *Hill* (1), and *Indermaur* v. *Dames* (2), and other cases. He was there on lawful business, in which both the plaintiff and the defendant had an interest, and he was there by the invitation of the defendant's servant, who referred him to the foreman in a matter relating to the defendant's business. He was proceeding to the place mentioned by those who directed him, and the bale which caused the injury was placed in such a position as to be dangerous, and yet to give no warning of danger to any one passing by the spot where it fell, so that it was in the nature of a "trap" or a concealed source of mischief, within the meaning of those words, as used in *Bolch* v. *Smith* (3), and in the case of *Sullivan* v. *Waters* (4), cited by the counsel for the defendant; so that whether the plaintiff could be properly described as a bare licensee or not, the defendant would be liable.

We, therefore, think that the order ought to be discharged.

*Order discharged.*

Solicitors for plaintiff: *Crook & Smith.*

Solicitors for defendant: *Lewis & Watson.*

(1) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318. 4 Jur. N.S. 512

(2) Law Rep. 1 C. P. 274; on appeal, Law Rep. 2 C. P. 311. 12 Jur. N.S. 432

(3) 7 H. & N. 736; 31 L. J. (Ex.) 201. 8 Jur. N.S. 197

(4) 14 Ir. C. L. Rep. 460.

## NELSON *v.* THE LIVERPOOL BREWERY COMPANY.

1877
*June 7.*

*Landlord and Tenant—Liability of Landlord for Injury happening to Stranger during Tenancy—Liability of Landlord for defective Repair of demised House—Negligence.*

A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition: in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy.

The defendants let to F. a house by an agreement in writing, by which F. agreed "to do all necessary repairs to the said premises except main walls, roof, and main timbers." There was no agreement by the defendants to repair, and the house was in good condition at the time of letting it. Owing to the defendants' negligence in not repairing a part of the main walls, a chimney-pot during the tenancy of F. fell upon the plaintiff, who was a servant of F., and injured him:—

*Held*, that the plaintiff was not entitled to recover compensation from the defendants for the injury sustained by him.

THE facts of this case are sufficiently stated in the judgment of the Court.

April 24. *Potter*, for the plaintiff, shewed cause.

*W. R. Kennedy*, for the defendants, supported the rule.

The following authorities were cited:—As to the liability of a landlord to repair: Woodfall's Landlord and Tenant, 9th ed. ch. 12, s. 1 (b), p. 488; as to the liability of the owner or occupier of a dangerous building or ship towards a servant or person employed therein: *Seymour* v. *Maddox* (1); *Couch* v. *Steel* (2); *Riley* v. *Baxendale* (3); towards a visitor: *Southcote* v. *Stanley* (4); and towards a licensee: *Indermaur* v. *Dames* (5); as to the effect of knowledge by a servant that he is employed by his master in a dangerous occupation: *Assop* v. *Yates*. (6)

*Cur. adv. vult.*

(1) 16 Q. B. 326; 20 L. J. (Q.B.) 327.

(2) 3 E. & B. 402; 23 L. J. (Q.B.) 121.

(3) 6 H. & N. 445; 30 L. J. (Ex.) 87.

(4) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(5) Law Rep. 1 C. P. 274; on app. 2 C. P. 311.

(6) 2 H. & N. 768; S. C. sub. nom. *Alsop* v. *Yates*, 27 L. J. (Ex.) 156.

1877

June 7. The judgment of the Court (Denman and Lopes, JJ.) was delivered by

NELSON v. LIVERPOOL BREWERY CO.

LOPES, J. This was an action brought in the Liverpool Passage Court by the plaintiff against the defendants to recover damages for injuries occasioned by the defendants' negligence. A verdict was found for the plaintiff for 60*l.*, leave being given to the defendants to move to set aside the verdict and enter a nonsuit, on the ground that the facts proved by the plaintiff disclosed no cause of action against the defendants.

The facts shortly were as follows:—One Farragher became the tenant to the defendants under an agreement dated the 10th of June, 1875, of a certain public-house, the property of the defendants, Farragher agreeing "to do all necessary repairs to the said premises except main walls, roof, and main timbers." There was no agreement to repair by the landlords, and it was admitted that the premises were not out of repair when Farragher became tenant. The plaintiff was a barman in the employ of Farragher, and on the 23rd of December, 1875, was knocked down by a chimney-pot falling on him from the premises in question as he crossed the yard, whereby he was seriously injured. The chimney-pot had been out of place for three weeks to the plaintiff's and Farragher's knowledge, and Farragher had given the defendants notice that it was overhanging the street, and had received from them a reply to the effect that they had given instructions that it should be looked to; the defendants had moreover sent a man to look at it. Evidence of a custom for landlords to do external repairs, when there was no express agreement on the subject, was given. The judge left several questions to the jury, which, so far as material, were as follows:—First, whether upon the evidence of usage the defendants were liable to repair? to which the jury replied in the affirmative; secondly, whether the chimney-pot was part of the main wall? to which they gave a similar reply; thirdly, whether the defendants were guilty of negligence, and whether by reason thereof the accident happened? which was also answered in the affirmative.

We are of opinion on the facts proved that the plaintiff has no cause of action against the defendants. We think the custom of

which evidence was given for landlords to do external repairs, when there is no express provision to that effect, was not such as could be incorporated in the agreement; nor such a custom as could create any liability in the defendants; it appeared to be a practice amongst landlords to repair for their own interest, and not a uniform, certain, and well-established usage.

We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier and the occupier alone being primâ facie liable: first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner: see *Payne* v. *Rogers* (1); *Todd* v. *Flight* (2); *Russell* v. *Shenton* (3); *Pretty and Wife* v. *Bickmore.* (4)

In the present case, however, there is no contract by the defendants, the landlords, to do repairs, and it is admitted that the premises were not out of repair when Farragher became the tenant. We think, therefore, the rule should be made absolute to enter a nonsuit.

*Rule absolute.*

Solicitor for plaintiff: *William Lowe, Liverpool.*
Solicitors for defendants: *Haigh & Son, Liverpool.*

(1) 2 H. Bl. 349.
(2) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.
(3) 3 Q. B. 449.
(4) Law Rep. 8 C. P. 401; see *Gwinnell* v. *Eamer and Wife* (Law Rep. 10 C. P. 658), where *Pretty and Wife* v. *Bickmore* was followed and approved.

1877
*Jan.* 19;
*June* 2.

[IN THE COURT OF APPEAL.]

WILSON AND BROWN *v.* BRESLAUER.

*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 126—*Composition Resolutions—Debts provable—Contingent Liability—Description of Debt in Debtor's Statement.*

5 C P D 355
23 C L D 708
712.

A debtor filed a petition under s. 126 of the Bankruptcy Act, 1869, which resulted in resolutions for a composition of 2*s.* in the pound, payable in one month from the registration. A. B. was inserted in the statement of debts and assets, under the name of A. B. & Co., as a creditor for a certain sum, and he proved for, voted in respect of, and received the dividend on, a larger sum. At the time of the petition A. B. was under liability, jointly with J. W., on a bail-bond which had been given by them to free the debtor's ship from arrest in a collision suit in the Court of Admiralty, but their liability on the bond was not inserted in the statement, and no claim against the debtor's estate was made in respect of it. After the dividend had been paid, the suit was decided against the debtor, and A. B. was called upon to pay under the bond:—

*Held*, by the Common Pleas Division (Lord Coleridge, C.J., Grove and Denman, JJ.), that, inasmuch as the liability on the bail-bond was a "debt or liability" which, though contingent, was provable under s. 31 of the Act and Rule 270, the debtor was released from it by the composition resolutions.

But by the majority of the Court of Appeal (James, Baggallay, and Bramwell, L.JJ.), reversing this judgment, that A. B. was not bound as to this debt by the composition resolutions, the debt not having been inserted in the debtor's statement under s. 126, and A. B. not having voted in respect of this debt; (Brett, L.J. dissenting, and agreeing with the Common Pleas Division.)

Affirmed by H of L 3 aff Cas 672

CLAIM. 1-6. In November, 1874, a collision took place between the steam-ship *Ringdove*, of which the defendant was the owner, and the brigantine *W. H. B.* On the 20th of January, 1875, the owners of the *W. H. B.* commenced a cause of damage in respect of the collision against the *Ringdove* and the owners thereof in the Court of Admiralty. On or about the 27th of January, 1875, the plaintiffs, at the request of the defendant, in order to prevent the arrest of the *Ringdove*, signed the usual bail-bond for a sum not exceeding 2300*l.*; and the ship was thereupon released.

7. The sum adjudged against the *Ringdove* together with the taxed costs amounted to 1487*l.* 8*s.* 4*d.*

8. The defendant neglected to pay the sum so adjudged against him, and on the 19th of February, 1876, the plaintiffs were called

upon to pay and did pay the same, together with a sum for interest thereon, amounting altogether to 1509*l.* 12*s.* 9*d.*

9. The plaintiffs have recovered under certain policies of insurance on the *Ringdove* 687*l.* 19*s.* 5*d.*, part of the 1509*l.* 12*s.* 9*d.* so paid by them; but the residue, amounting to 821*l.* 13*s.* 4*d.*, still remains due to the plaintiffs from the defendant.

10. The plaintiffs have also been put to costs, and incurred expenses by reason of their having signed the bail-bond amounting to 50*l.*

11. All conditions were fulfilled, all things happened, and all times elapsed, necessary to enable the plaintiffs to have the defendant repay to the plaintiffs the said 821*l.* 13*s.* 4*d.*, to indemnify and save harmless the plaintiffs against the said costs and expenses so incurred by the plaintiffs as aforesaid, and to maintain this present action; yet the defendant has not repaid to the plaintiffs the said 821*l.* 13*s.* 4*d.*, or any part thereof, and did not indemnify and save harmless the plaintiffs against the said costs.

The plaintiffs claim 821*l.* 13*s.* 4*d.* with interest thereon from the 16th of February, 1876, until payment, at the rate of 5*l.* per cent. per annum, and 50*l.*, the extra costs incurred by them.

Defence. 1. After the making of the bail-bond, and after the 31st of December, 1869, the defendant, then being a debtor unable to pay his debts, presented to the London Bankruptcy Court a petition for liquidation of his affairs by arrangement or by composition with his creditors, and caused to be summoned, in the manner prescribed in the Bankruptcy Act, 1869, and the rules made in pursuance thereof, a general meeting of his creditors, which was duly held accordingly, and a majority in number and three fourths in value, estimated according to the said Act, of the creditors of the defendant assembled at the said meeting, by an extraordinary resolution, resolved,—1. that a composition of 2*s.* in the pound should be accepted in satisfaction of the debts due to the creditors from the defendant,—2. that such composition be payable as follows, that is to say, within one calendar month after the registration of the resolution of the second meeting,—3. that H., B., of &c., accountant, be appointed trustee in the interim for the receipt and distribution of the composition, and

1877

WILSON v. BRESLAUER.

that Messrs. E. & C., of &c., be intrusted with the registration of the extraordinary resolution. The said resolution was afterwards duly confirmed at a subsequent general meeting. The defendant was present at each of the said meetings, and produced to the same respectively a statement shewing the whole of his assets and debts, and the names and addresses of the several creditors to whom the said debts respectively were due, and, amongst others, shewing the amount of the several debts and causes of action herein pleaded to as being due to the plaintiffs, whose names and addresses were also shewn in the said statement as creditors in respect thereof: And all proceedings were duly taken and had as prescribed by the said Act and rules respectively, and all things happened and were done, and all payments were made, and all times elapsed, necessary to make the extraordinary resolution binding on all the creditors of the defendant, including the plaintiffs, and to make the composition a bar to the alleged causes of action herein pleaded to; and the said several alleged debts and causes of action were and are debts provable in bankruptcy.

2. Statement (so far as related to the claim of the plaintiff Wilson) of an agreement between Wilson and others and the defendant, to accept a certain sum in settlement of all demands on the part of Wilson, including the contingent liability of the defendant on the bail-bond and the causes of action in dispute in this action, so far as regards Wilson, and of payment by Wilson to defendant of the balance.

Reply. 1. The plaintiffs join issue on the defendant's defence.

2. At the time of the making of the composition and of the meetings mentioned in the first paragraph of the defence, the cause in the Admiralty Court had not been heard and no sum had been then adjudged against the *Ringdove*, and the plaintiffs had no claim provable in bankruptcy against the defendant, or which was or could be included in and discharged by the composition.

3. The statement produced to the meetings of creditors did not include the plaintiffs' claim herein, or any part thereof, and, if the names and addresses of the plaintiffs were shewn in the statement (which they deny) they were not shewn as creditors in respect of the debt sought to be recovered in this action.

4. The contingent liability of the plaintiff Wilson on the bail-bond was not included in the settlement as alleged in par. 2 of the defence. Issue thereon.

The cause was tried before Cockburn, C.J., at the Hertford summer assizes, 1876. The facts were in substance as follows:— In January, 1875, the plaintiffs, John Wilson and Arthur Brown, at the request of the defendant, became bail for him and signed the usual bail-bond in order to obtain the release of the steamship *Ringdove* (of which the defendant was owner) from arrest in a suit in the Admiralty Court for a collision with a brigantine called the *W. H. B.* In the early part of 1876, the suit came on for hearing, and in February, 1876, the *Ringdove* was adjudged to be solely in fault; and, upon the result of a reference to the registrar and merchants, a sum of 821*l.* 13*s.* 4*d.* was found due to the owners of the *W. H. B.* after deducting the amounts received on certain policies of insurance. This sum was afterwards paid by the plaintiffs, under the bail-bond, in equal shares.

In May, 1875, the defendant petitioned the Court of Bankruptcy under s. 126 of the Bankruptcy Act, 1869, and at meetings duly held the proper majority of the creditors present agreed to resolutions accepting a composition of 2*s.* in the pound on their respective debts, in the terms set out in par. 1 of the defence. The meeting at which the resolutions were confirmed took place on the 25th of July, and was registered on the 3rd of August, and the composition was paid within a calendar month.

The name of John Wilson, as "Wilson & Co.," appeared in the statement produced by the debtor at the meetings as creditors for a large sum. The name of Arthur Brown, described as "Arthur Brown & Co.," appeared originally as a creditor for 586*l.* 6*s.* 1*d.*, but this was afterwards increased by proof before the trustee to a sum of 942*l.* 11*s.* 1*d.* But neither of them was inserted in the statement as creditors in respect of any contingent claim which they might have with reference to their liability on the bail-bond. Both, however, had notice of the proceedings, and both attended the meetings and signed the resolutions and received the composition on their other debts.

There was conflicting evidence as to the settlement of claims

1877

WILSON v. BRESLAUER.

between Wilson and the defendant, alleged in the second paragraph of the statement of defence, as to whether or not the liability of the plaintiff Wilson in respect of the *Ringdove* was included in that settlement.

On the part of the plaintiffs it was submitted that, the claim with respect to the bail-bond not being mentioned in the defendant's statement of debts produced at the meetings, the composition was no answer to the action. On the other hand it was insisted that, being assenting parties to the composition, the plaintiffs were bound in respect of all debts and liabilities which were provable, whether contingent or otherwise.

The Lord Chief Justice left it to the jury to say whether the defendant's version of the alleged settlement was correct or that of the plaintiff Wilson. On this the jury found for the defendant.

A verdict and judgment were entered for the plaintiff Brown, subject to leave to the defendant to enter judgment for him on the first paragraph of the statement of defence; and a verdict and judgment for the defendant as against the plaintiff Wilson on the second paragraph of the statement of defence,—execution being stayed until the 31st of July, to enable the plaintiff Wilson to move for a new trial; which he accordingly did.

C. P. D.

Jan. 19. *Lumley Smith* moved to enter judgment for the defendant, as against the plaintiff Brown. The claim of the plaintiff Brown is barred by the composition. His name was correctly inserted in the debtor's statement of debts produced at the meetings in pursuance of s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), in respect of a debt of 586*l.* 6*s.* 1*d.*, though he ultimately proved before the trustee for a much larger sum. It is set up in answer that the debt for which Brown proved, and upon which he received a dividend, did not include the claim in respect of which this action is brought. But, whatever debt or liability is provable in bankruptcy is barred by the composition: see s. 126, and Rule 270. The recent case of *Campbell* v. *Im Thurn* (1) decides that the non-insertion of a debt in the statement is immaterial, if the creditor comes in and takes part in the proceedings and assents to the composition, the provision in s. 126,

(1) 1 C. P. D. 267.

par. 7, being applicable only to the case of persons who have not agreed to be bound, and not to the case of creditors who agree to accept the composition. Sect. 31 of the Bankruptcy Act, 1869, makes *all* debts and liabilities, except unliquidated damages for a tort, primâ facie provable. The value of contingent liabilities is to be estimated by the trustee, subject to the control of the Court. A creditor cannot take advantage of the composition as to a part of his claim, and lie by and reserve his right of action as to another part: *Ex parte Peacock.* (1)

*Philbrick, Q.C.*, and *Grantham*, for the plaintiff Brown. The liability of the defendant in respect of the bail-bond was contingent, and was not a liability to Brown alone, but to Wilson and Brown. It was not and could not have been included in the debtor's statement, the contingency not having then resulted in a debt. It is of essential importance that all debts shall be inserted in the statement; and, if any one is omitted, it is the debtor's own fault. *Ex parte Peacock* (1) was an entirely different case from this: there there was an existing liability, the amount only remaining to be ascertained.

[LORD COLERIDGE, C.J. In *Campbell* v. *Im Thurn* (2), it was distinctly held that the provision in s. 126, par. 7, applies only to persons who have not assented to be bound by the resolutions. My Brothers Brett and Lindley give their reasons in language to which I entirely assent. Similar arguments to the present were ineffectually urged there.

DENMAN, J. In that case the debt was inserted: the objection was that the names of the creditors were not.]

The reason of the decision was that there had been an adoption by the creditor of the debt as there entered. To bind him, the creditor must assent in respect of the debt mentioned in the statement. If the creditor assents to debt A., that is no reason why his assent should be held to apply to debt B.

*Ex parte Manchester and Liverpool District Banking Co., Re Littler* (3), and *Ex parte Birmingham Gas-Light Co., Re Adams* (4), were also cited.

[LORD COLERIDGE. C.J., referred to *Simpson* v. *Henning*. (5)]

(1) Law Rep. 8 Ch. 682.
(2) 1 C. P. D. 267.
(3) Law Rep. 18 Eq. 249.
(4) 40 L. J. (Banky.) 1. 11 & 204
(5) Law Rep. 10 Q. B. 406.

1877

WILSON v. BRESLAUER.

C. P. D.

*Lumley Smith*, in reply. The object of the provision in s. 126 is, that every creditor may have notice of the proceedings; and by rule 310: "Proof of debt by any creditor shall be deemed conclusive evidence that notice of all general meetings prior to and inclusive of that at which such proof is produced has been duly given to him." Sect. 126, par. 7, says that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice *the rights of any other creditors*,"—not "the rights of assenting creditors in respect of other debts than those inserted in the statement." The reason for holding the creditors bound as to *all* debts provable is, that the parties to the resolutions are influenced by the assumption that all the other creditors are assenting parties. If the amount of the debt is erroneously inserted, the creditor may get the trustee to set it right; or, if it be subject to a contingency, he may apply to the Court; or, in this case, the plaintiffs might possibly have inserted the amount of penalty of the bond, leaving the debtor to get it cut down.

Lord Coleridge, C.J.

LORD COLERIDGE, C.J. I am of opinion that our judgment should be for the defendant. The action was brought against a person who had compounded with his creditors under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126, by the plaintiffs Wilson and Brown, for the full amount of a debt which it may be taken for shortness' sake was not either mentioned in the list of debts nor proved in the proceedings under the composition. The argument addressed to us was that, by the true construction of the 126th section of the Act, the plaintiffs were not bound by the resolution, and were entitled to recover their debt.

Now, various points have been made in the course of the argument which were not seriously pressed. It was suggested that the plaintiff Brown had had no notice of the meetings because he had only been scheduled in the list of creditors by the compounding debtor as "Arthur Brown & Co.," whereas he had attended and had proved as Arthur Brown, and no notice was given to him as Arthur Brown, and that this was a private and personal debt of

Arthur Brown, and not a debt of the firm of Arthur Brown & Co. It was admitted that Arthur Brown was identical with Arthur Brown & Co., that is to say that the firm consisted of Arthur Brown and no one else. That point, however, was not seriously argued, because it has been held that notice means knowledge. Brown came in and proved under the composition for a large sum of money, and he has received the dividend under that composition. It is plain, therefore, that he had knowledge, and he attended the meetings and became a party to the composition.

Then it was said that the amount of his debt was not truly stated by the debtor; nor was it, because the statement by the debtor shewed a debt of 586*l.* 6*s.* 1*d.*, and the proof on the part of Arthur Brown which was admitted by the trustee, was for about 1000*l.* Therefore the fact is that the debt stated by the debtor was, I will not say not truly stated, but was certainly not accurately stated, because the proof was for a very much larger sum, and for a different debt.

It was also admitted, indeed it could not be denied, that neither in the statement by the debtor nor in the proof by the creditor was the debt the subject-matter of this action included, and that as a matter of fact, whatever the result in law may be, the debt which is the subject-matter of this action has not been the subject-matter of any composition; and it was contended that it must not be taken into account in the proceedings at all. The question is whether, notwithstanding that, it is barred. I am of opinion that it is barred.

Without going into the minute circumstances, and how that arose, the debt was, as both the learned counsel for the plaintiff have been forced to admit, a contingent liability. In all probability it was a liability the exact money value of which it might have been exceedingly difficult to appreciate: still it was a contingent liability,—a liability that *might* come into esse. It had not come into esse at the time of the composition; but it might come into esse. Now, in that state of things, it was a debt which was provable in bankruptcy. The 31st section of 32 & 33 Vict. c. 71, begins with enacting that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person

1877

WILSON v. BRESLAUER.

C. P. D.

Lord Coleridge, C.J.

having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice:" it then goes on, "Save as aforesaid, all debts and liabilities present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy."

Now, the 126th section, under which this composition took place, says that "the creditors of a debtor unable to pay his debts may without any proceedings in bankruptcy, by an extraordinary resolution resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor:" and, if they do so resolve, then the debtor is discharged from those debts. What are the debts which fall within that section? That is ascertained by rule 270, which provides that "all debts which would have been provable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings shall be provable under any such proceedings." Debts, therefore, which are provable under a composition are the same as debts provable in bankruptcy: and, if this was a provable debt, and a debt which could be dealt with by composition, it was a debt, supposing the composition to apply, which would as against an assenting creditor be barred by a composition. Is this, then, a person whom the composition bars and against whom it is effectual? It is said that it is not, because one of the clauses of s. 126 provides that "the provisions of a composition accepted by an extraordinary resolution in pursuance of that section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

The question, therefore, really depends upon two considerations,—first, against whom does this provision enact that the composition shall be binding, or rather, whom does it exempt from

1877

WILSON v. BRESLAUER.

C. P. D.

Lord Coleridge, C.J.

the composition not properly entered into? Secondly, what is the true meaning of "the amount of the debts due to whom is shewn in the statement of the debtor?" We have had our attention called by my Brother Denman to a case which, so far as one portion of this section is concerned, is conclusive against the plaintiff, viz. the case of *Campbell* v. *Im Thurn*. (1) In that case this Court decided,—and it was necessary for the decision of that case that the Court should go into the question,—that that provision had no application except to the case of a non-assenting creditor, and that, if a creditor was an assenting creditor, although his name and address had not been shewn in the statement of the debtor produced to the meetings at which the resolution passed, nevertheless his rights were affected and prejudiced by the composition to which, though his name and address were not shewn in the statement of the debtor produced to the meetings, he had assented.

We have now to consider whether a composition is binding on a creditor who has assented, as is shewn by his coming in and proving under the composition, and who has accepted a dividend, where his name and address are shewn in the statement, but the true amount of his debt is not. Looking at the ratio decidendi in *Campbell* v. *Im Thurn* (1), I am unable to distinguish that case from the present. Both the learned judges who decided that case cite the whole section, and expressly say that the proviso at the end applies only to the case of a non-assenting creditor, and does not apply to that of an assenting creditor. Here the party is an assenting creditor, and therefore within the terms of that judgment he is bound by the composition. Is there any reason for distinguishing between the shewing of the amount of the debt and the shewing of the name and address of the creditor? In that case the name and address were not shewn, but the amount of the debt was. Here the true amount of the debt was not shewn, but the name and address of the creditor were shewn. Can there be any sensible distinction between the two omissions? I think not. The true subject of the enactment is, to bring to the knowledge of the creditors that the proceedings are going on, and that their debts are duly inserted in the statement produced by the debtor; and it is only upon those who have such knowledge that

(1) 1 C. P. D. 267.

1877

WILSON v. BRESLAUER.

C. P. D.

Lord Coleridge, C.J.

the composition is binding. If there is no proper notice, and the creditor chooses to stand aloof, he may do so: but, if he has notice that the composition is going on, and knows further that his name is inserted for something, and he does not assent to that as a true statement of his claim, there are means pointed out in the Act itself and in the rules appended to the Act by which he can get an imperfect or inaccurate statement by the debtor as to his claim rectified. The whole object of these composition sections is to relieve the debtor, in a form which for aught I know may be less expensive and less prejudicial to his future prospects, but substantially to relieve him to the same extent as if regular proceedings in bankruptcy had taken place.

Now, it is an essential part of the consideration which leads this, that, or the other creditor to assent to an arrangement of this sort, that it is done on behalf of *all* the creditors, and is to enure as a release of the compounding debtor from *all* his debts and liabilities on payment of a certain composition, and to make him a free man: and it would be contrary to the object with which the bankrupt laws,—of which the proceeding by composition has been held to be one (1),—were passed, if a particular creditor, knowing that the proceedings are going on, and knowing that he had a claim against the debtor, though possibly of a contingent character, were to content himself with an imperfect statement when he had the means of correcting it, or, as in this case, content himself with an imperfect and partial statement of his claim, and afterwards, when the debtor was supposed to have been released from all his debts and liabilities, to come forward and say, "I claim payment of this or that liability in full, because a contingency has now arisen which I did not foresee at the time I accepted the composition, and, having now ascertained the amount of my hitherto concealed contingent claim, I insist upon being paid the amount in full." I think that would be a violation of the policy of the bankrupt law and of the proceeding by composition. I therefore think there is no substantial distinction between the case where the amount of a debt is inaccurately or imperfectly shewn, and the case where the name and address of the particular creditor are not truly shewn in the statement produced by the

(1) See *Megrath* v. *Gray*, Law Rep. 9 C. P. 216.

debtor, or not shewn at all. Not only, in my opinion, do the words, but the spirit and principle of the decision in the case of *Campbell* v. *Im Thurn* (1), govern this case: and upon the authority of that case I am content to rest my decision in this.

I am not quite sure how far my learned Brothers will agree with me on the further point, which it is not perhaps necessary to go into if the point which I have already discussed be correctly decided, because that disposes of the whole case. But I am of opinion that the true construction of the words in s. 126, "the amount of the debts due to whom is shewn in the statement of the debtor produced to the meetings at which the resolution has passed," is, that the debtor shall state what he conceives to be the true amount of each debt, and, if the words "the amount of the debts due" are expanded, they mean "the amount of the debts said by the debtor to be due," because the statement is not conclusive against the creditor. The creditor has the means of correcting it; and in this very case he has corrected it, for he proved under the composition resolution for nearly double the amount at which his debt was stated by the debtor. Even if the first point, therefore, about which I have a clear opinion, were not decided by the case of *Campbell* v. *Im Thurn* (1), there is this further point upon the words of s. 126, which I think have been literally as well as substantially complied with by the debtor. It seems to me that this was a debt provable in bankruptcy, and therefore provable under a composition, and a debt from which, as against an assenting creditor (which the plaintiffs were), the debtor is discharged. I think, therefore, that the defendant is entitled to have judgment entered up for him.



GROVE, J. I am of the same opinion. My Lord has gone so fully into the matter that I have very little to add. It was at first faintly contended by the counsel for the plaintiffs that this was not a contingent liability; but there is no weight in that argument, and it was not much pressed. It was also suggested that Arthur Brown was separable from Brown & Co., the name of the firm under which he traded: but there was nothing to warrant that suggestion.

(1) 1 C. P. D. 267.

1877

WILSON v. BRESLAUER.

C. P. D.

Grove, J.

The real argument relied on by the plaintiffs was, that a composition under s. 126 of the Bankruptcy Act, 1869, was not binding on the creditors, except in respect of the debts which are shewn in the statement produced by the debtor at the meetings at which the resolutions for the composition were passed, and that the composition arrangement was binding upon the creditor (an assenting creditor) only as to the debt so entered, and it was competent to him to reserve any other debt, whether contingent or otherwise, and, after receiving the dividend upon the debt so entered, to pursue his remedy against the debtor in respect of the other debt. That is a very strong proposition, and it would seem to be repugnant to the general policy of the bankrupt law, because it comes to this, that, where a body of creditors have met and have agreed to accept a composition upon their several debts and to release their debtor, one of them may, whether by accident or by design, have a claim inserted in respect of one debt and reserve another, whether absolute or contingent, and, having perhaps induced others to join in the composition upon the faith of his seeming assent, afterwards turn round and claim to receive in full the debt so reserved. Now, is there anything in the Bankruptcy Act of 1869 to sustain such a proposition? I think not. The 126th section enacts in the 7th clause, that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the *debts* due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors;" and rule 270, which is to be read with that clause, provides that "all *debts* which would have been provable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings shall be provable under any such proceedings." The "debts" must be the same in either form of proceeding, whether bankruptcy or composition. The legislature must have contemplated that, where the creditors have due notice and come in and prove under the composition, they must prove, as in bankruptcy, in respect of all their debts whether absolute or contingent. It may be that a mistake in the amount inadvertently made by the debtor in the statement of his

debts may be corrected; but there is no pretence for saying that a creditor who has been an assenting party to the composition can afterwards sue the debtor for a debt which was not included in the statement produced at the meetings. That the plaintiff here was an assenting creditor could not be denied. The learned counsel for the plaintiffs were driven to contend that his assent to the composition was qualified only; an assent quoad the debt mentioned in the statement, but not as to another debt the amount of which was unascertained at the time of the passing of the resolutions. To allow that sort of qualified assent would render the whole arrangement futile. The obvious intention was that a debtor who compounds with his creditors under s. 126 should be equally freed from all his liabilities as if the proceedings had taken place in bankruptcy proper. In both he is to start as a new man. There are, doubtless, many differences between composition and bankruptcy. But there is nothing to shew that there is any distinction between them as to the provability of debts. I therefore agree with my Lord that our judgment should be for the defendant.

DENMAN, J. I am of the same opinion. This case raises a pure question of law upon undisputed facts. The plaintiffs suing in respect of a certain cause of action, the defendant in his statement of defence sets up an arrangement by way of composition with his creditors which he says binds the plaintiffs Wilson and Brown. I wish, before proceeding to the reply, to call attention to one part of the statement of defence, because I made an observation in the course of the argument which might have appeared rather to be in favour of the plaintiffs, and which I think, when rightly understood, ought not to have such an effect. In the course of the trial, the Lord Chief Justice, who tried the cause, made a note in the margin of the statement of defence, to the effect that according to his then opinion a portion of that statement of defence failed in point of fact. Now, I think that down to the present time that allegation in the statement of defence does fail in point of fact. That allegation is, that the statement produced by the debtor at the meetings shewed the amount of the several debts and causes of action therein pleaded to as being due to the plaintiffs. Looking at that allegation according to the truth of the case, and at

Denman, J.

1877

WILSON v. BRESLAUER.

C. P. D.

Denman, J.

the reply, that appears not to be so. In point of fact the identical debt now sued for was not included in the statement produced by the debtor. But then I do not think that was at all necessary, for the reasons which I will presently give.

The reply begins by stating that, "at the time of the making of the composition and of the meetings mentioned in the first paragraph of the defence, the cause had not been heard and no sum had been then adjudged against the *Ringdove*, and the plaintiffs had no claim whatever provable in bankruptcy against the defendant, or which was or could be included in and discharged by the composition." That is the substance of the plaintiffs' answer to the defence now, upon that part of the reply, viz. that there was no debt or claim provable.

Now, I entirely agree with the rest of the Court that this clearly was a claim provable in bankruptcy; it was a claim which, though not at the time reduced to a certainty, was actually pending and was likely to be reduced to a certainty, and it was ultimately reduced to a certainty. According to s. 31 of the Bankruptcy Act, 1869, therefore, it was a claim which was provable in bankruptcy. It follows then that it was a claim which would be the subject of composition, because by rule 270 it is provided that "all debts which would have been provable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings shall be provable under any such proceedings."

Then the reply goes on to say that "the statement of the defendant produced at the meetings of his creditors did not include the amount of the plaintiffs' claim herein, or any part thereof." Now, I apprehend that, if that statement is really an immaterial statement, and the defendant is entitled to judgment notwithstanding all that may be true, then it matters not whether it is true or not; and that is the part of the statement of reply which is addressed to that part of the statement of defence as to which the Lord Chief Justice made the note that it failed in point of fact. Then the statement of defence goes on to aver that "all payments were made and all times elapsed necessary to make the extraordinary resolution binding on all the creditors of the defendant, including the plaintiffs, and to make the said composi-

tion a bar to the alleged causes of action." At the most it would have been a matter of amendment of the statement of defence, in order to raise the very state of things on which the Court is acting.

Then the question is whether, notwithstanding the exact amount of it is not stated, the resolution for the composition in this case did not include this claim. I hold,—and I think my Lord said the same thing, only in other words, though in one part of his judgment he seemed to contemplate a possible difference of view between himself and other members of the Court,—upon a full consideration of the scope of these enactments, that it is not necessary that each particular debt should be identified in the statement of the amount of debts. The debtor must state an amount of debt, and, if that turns out to be inaccurate, the creditor, or the debtor, or the trustee can have it set right: mere inaccuracy in the amount will not invalidate the whole proceedings from first to last, as between the debtor and an assenting creditor.

Now, the question arises, what is the meaning of the term "assenting creditor?" I do not think it can be limited to the case of a man who comes in and says, "debt A., debt B., and debt C., are all debts due to me, and I shall consider myself an assenting creditor if debt A. is inserted, but a non-assenting creditor if debt B. is excluded from the statement." An assenting creditor, I apprehend, is a person who assents to the composition by acting under it and by becoming a party to the proceedings which take place under the composition. In that sense, it is plain that both Wilson and Brown were assenting creditors within s. 126 and within the case decided by this Court of *Campbell* v. *Im Thurn* (1), because they knew of the proceedings and never raised any question as regards the claim now under consideration.

I do not intend to decide by this that the plaintiffs may not now possibly,—because that may depend entirely on whether they have brought themselves within the machinery of the Bankruptcy Act,—have some remedy. All that I desire to decide is, that, upon these pleadings, and upon these facts, they cannot sue in respect

(1) 1 C. P. D. 267.

1877

WILSON v. BRESLAUER.

C. P. D.

of this claim, and that in my opinion the defendant is entitled to judgment on the undisputed facts in the case.

I therefore agree with the rest of the Court that the motion to enter judgment for the defendant must be decided in his favour.

*Judgment for the defendant as against the plaintiff Brown.*

*Lumley Smith* then shewed cause against the rule for a new trial obtained by the plaintiff Wilson.

*Philbrick, Q.C.*, and *Grantham*, contrà, were not heard.

THE COURT discharged the rule. (1)

*Rule discharged.*

C. A.

The plaintiffs respectively appealed.

Jan. 5. *Grantham, Q.C.*, for the plaintiffs.

*Horton Smith* and *Lumley Smith* for the defendants.

The arguments and cases cited were the same as in the Court below.

THE COURT (James, Baggallay, Bramwell, and Brett, L.JJ.) intimated that they saw no cause to disturb the verdict for the defendant against the plaintiff Wilson; as to the plaintiff Brown, the Court would take time to consider.

*Cur. adv. vult.*

June 2. The following judgments were delivered:—

Brett, L.J.

BRETT, L.J. In this case I am sorry to say I cannot agree with the rest of the Court. I am of opinion that this judgment ought to be affirmed.

The action was brought by the plaintiffs to recover from the defendant money which they had been forced to pay in respect of having signed a bail bond in the Court of Admiralty with regard to a ship of the defendant's, which had been, there, seized. After the plaintiffs had entered into the bail bond, and before they could be made liable to the payment under it, the defendant presented a petition for arrangement by liquidation of his affairs, or by composition. The plaintiffs were creditors of the defendant

(1) The question turned principally upon the terms of a very special agreement and the contradictory evidence given by either party.

1877

WILSON v. BRESLAUER.

C. A.

Brett, L.J.

for other debts. They were under the liability of this bail bond, which, I think, was a contingent liability, and was a liability that would have been provable in bankruptcy. The defendant, in his statement of affairs, which he laid before his creditors, inserted the other debts due to the plaintiffs, but made no mention of this contingent debt. The plaintiff Brown was present at the meetings, and was party to the resolutions, which were passed according to the statute by a majority of the creditors, and the plaintiff Brown was a party to the resolution which was, in terms, that a composition of 2*s.* in the pound should be accepted in satisfaction of the debts due to the creditors from the defendant. The plaintiff Brown having been party to that resolution, that was confirmed. I need not go further into the particulars of the arrangement under the composition. It does not seem that the matter was so far concluded, that the defendant has received an order of discharge. I do not find that that is asserted or proved in this case; but after the plaintiff Brown had become a party to this composition, he was made liable in the Court of Admiralty under the bail bond, and he has brought this action against the defendant for the whole amount of what he was so made to pay. I do not understand that the defendant disputes that he was liable to pay to the plaintiff the dividend of 2*s.* in the pound upon that which the plaintiff has been made to pay, but he denies that he is liable to an action for the whole amount, and I am of opinion that he is not so liable, and that this action cannot be maintained.

In coming to this opinion I act upon the same views of the Bankruptcy Act which I entertained and expressed in the case of *Campbell* v. *Im Thurn.* (1) It seems to me that the reasons given in that judgment, both by myself and my Brother Lindley, whose opinion is of much more importance than my own, lead logically to the conclusion that this action cannot be maintained.

My view of the Bankruptcy Act is this: that it contains three kinds of bankruptcies—one which may be called a bankruptcy proper, another a bankruptcy which is called a liquidation by arrangement, and the third a bankruptcy by means of a composition arrangement. All these three are by the Bankruptcy Act

(1) 1 C. P. D. 267.

1877

WILSON v. BRESLAUER.

C. A.

Brett, L.J.

commenced by the petition in bankruptcy, and all of them result in an order of discharge given under and by virtue of the Act. I apprehend the object as a result of all these proceedings is an order of discharge under the 49th section; and I think it has been held, in many cases, that although the same proceedings do not take place in the different kinds of bankruptcies, yet they are all to be considered as essentially bankruptcies within the Bankruptcy Act. The two bankruptcies by means of liquidation arrangement and composition arrangement are a milder form of bankruptcy. They are not attended with the same public consequences, but they are according to my view of this statute, essentially bankruptcies, and, unless otherwise provided by the statute, are subject to all the rules and principles which attach to bankruptcy proper.

In the case of *Campbell* v. *Im Thurn* (1) we had to consider the construction which we thought we ought to put on the 126th section, and we came to the conclusion that parties might be bound by proceedings in a composition which was to be carried on under the 126th section in two different ways; that creditors might be bound by the registration of composition proceedings, although they were non-assenting or dissenting creditors; but if they were to be bound, being non-assenting or dissenting creditors, then all the requisites to bind non-assenting or dissenting creditors must be strictly complied with; that is to say, that the names of the creditors must be inserted in the statement of affairs of the debtor, and the amount of the debts, and unless both these conditions were fulfilled, the creditor would not be bound by the composition. But we thought that a creditor might also be bound by a composition, which composition was to be carried out according to the 126th section, and according to the other sections of the statute applicable to a composition arrangement, although his name was not inserted in the statement of affairs of the debtor, if the creditor actually attended the meetings and became an assenting party to the resolution; and that then, although his name was not inserted, and although he would not, if he remained absent, have been bound by the composition, yet inasmuch as he attended and became a party, he was, through that assent and

(1) 1 C. P. D. 267.

presence, bound by the composition arrangement, which composition arrangement was to be carried on under the 126th section and other sections of the statute applicable to composition arrangements.

In this case the amount of the contingent debt was not put into the statement of affairs, and indeed no mention of it was made in the statement; but Brown did attend meetings and became a party to the resolutions. He voted in respect of the other debts which were named in the statement of affairs, and which statement of affairs with regard to those debts he adopted; but he did not vote at all in respect of this contingent debt. There was no specific arrangement between him and the debtor to omit the mention of this contingent debt. There is no semblance of fraud in the transaction. It was an omission, but an omission bonâ fide made by mistake both of the debtor and of Brown the creditor; and the question therefore is, whether Brown was bound by the composition arrangement with regard to that debt which was not mentioned, and in respect of which he did not vote, but which was bonâ fide omitted.

Now, I assume that this was a debt provable in bankruptcy. It seems to me the question would have been precisely the same if this had not been a contingent debt, but had been a debt without any contingency at all. Therefore the question comes to this, where there has been a petition in bankruptcy for arrangement by liquidation or composition, where there has been a meeting of creditors, where the debtor has stated some of the debts due to a particular creditor, but has omitted a particular debt, and where that creditor attends the meeting and makes no claim to a rectification of the statement of affairs, but votes in respect of the debts named in the statement of affairs (the omission of the particular debt having been bonâ fide, both as respects the creditor and the debtor),—whether you can say that that creditor can, in respect of the omitted debt, afterwards sue for the whole amount of the debt. I come to the opinion that he cannot. If it were a pure bankruptcy, and a creditor had to prove his debt, he is bound to prove all provable debts, and if he omits to prove any provable debts, and the bankrupt obtains his discharge under the statute, the creditor is barred in respect of the debt that he has not proved for, although he may have omitted it by mistake, and

1877

WILSON v. BRESLAUER.

C. A.

Brett, L.J.

although the omission may have been perfectly bonâ fide as between him and the debtor; yet he is barred because he did not prove. I apprehend the reason of that is, because the real consideration for the agreement of all the creditors to release the debtor is the assumption by them all that all the other creditors agree to the same thing in respect of all their debts, and that it is contrary to the policy of the bankrupt laws to allow any one creditor, however bonâ fide he may act, to prove and to accept a dividend on some of his debts, at the same time reserving to himself the right to claim the full benefit in respect of other debts. It is a bargain, the consideration for which is the agreement of all the other creditors to the same thing.

If that be so in a pure bankruptcy, I can see nothing which is to cause a different effect in the other more mitigated bankruptcies which are, now, contained in this statute. It seems to me that that which would be contrary to the bankrupt law in the case of a pure bankruptcy, is equally contrary to the bankrupt law in respect of mitigated bankruptcies. The object—the main object—the fundamental object of all the proceedings under this Bankruptcy Act, is to produce the discharge of the debtor, and also that all the creditors of the debtor should be put upon an equal footing; and anything which is to break those two fundamental principles of the statute in any one of the cases cannot be allowed. Of course, if there had been a specific agreement between the debtor and creditor to omit one debt—if there had been a fraudulent agreement between the debtor and the creditor, to omit one debt for the purpose of defeating other creditors, every one would agree that the creditor could not afterwards sue the debtor; but in the cases of such frauds as are thus described, there is a much greater, and more fundamental effect, because if there be such a fraudulent agreement between the debtor and the creditor, all the other creditors are at once absolved from the composition, and every one of them may sue for the whole of his debt. I do not think that result would arise from mere omission, such as there is in this case, where there is no such fraud. But I do think that a creditor who has, by mistake, omitted to bring forward a particular debt, is barred when he has been a party to the resolution.

1877

WILSON v. BRESLAUER.

C. A.

Brett, L.J.

This action, I apprehend, must be treated as if barred before the order of discharge had been arrived at, because I do not see any evidence that an order of discharge had been given; but it seems to me that we ought to consider the case in just the same way as if the order of discharge had been made. If the order of discharge had been made it would have been in the terms of the resolution, for the resolution must be taken into the court, and the order of discharge would have been a discharge of the debtor from all his debts. I cannot see why this debt is not to be included. Therefore, acting upon the view of the statute which was taken in the case of *Campbell* v. *Im Thurn* (1), adding to that view that in my opinion these three proceedings under the statute are, all of them, bankruptcies, and all subject to the general laws and conditions with regard to bankruptcy proceedings, I come to the conclusion, although of course with great doubt, knowing that there are high authorities to the contrary, that the judgment of the Court below was right, and ought to be affirmed.

I will now proceed to read the judgment of Lord Justice Baggallay in which Lord Justice James concurs.

Baggallay, L.J.

BAGGALLAY, L.J. This is an appeal from the Common Pleas Division under the following circumstances.

In the month of November, 1874, a collision took place between the steamship *Ringdove*, of which the defendant was the owner, and the brigantine *W. H. B.*; and, on the 20th of January, 1875, the owners of the brigantine commenced an action in the Court of Admiralty against the *Ringdove*. On the 27th of January, 1875, the plaintiffs, at the request of the defendant, and in order to prevent the arrest of the ship, and upon the promise of the defendant to indemnify them in respect of their so doing, signed the usual bail-bond for 2000*l*. The sum eventually adjudged against the *Ringdove* exceeded 1400*l*., and in consequence of the default of the defendant the plaintiffs were called upon to pay, and did pay, sums amounting in the whole to upwards of 1500*l*.; of this amount a portion was recouped to them out of the realisation of certain policies held by them as security; and on the 19th of May, 1876, they brought the present action to recover the

(1) 1 C. P. D. 267.

1877

WILSON v. BRESLAUER.

C. A.

Baggallay, L.J.

balance of 821*l.* 13*s.* 4*d.* (which it appeared had been contributed by them in equal shares), with interest and costs.

In the interval between the signing of the bail-bond and the adjudication against the *Ringdove*, which did not take place until February, 1876, a resolution for accepting a composition of 2*s.* in the pound, payable within one calendar month from the registration of such resolutions, was duly passed by a statutory majority of the creditors of the defendant under the provisions of the Bankruptcy Act of 1869, and was duly registered on the 3rd of August, 1875.

The defence of the defendant to the action so brought by the plaintiffs was, as against both plaintiffs, that the action was barred by the composition; and, as a further defence to the claim of the plaintiff Wilson, the defendant pleaded that there had been a settlement of all accounts between them, that the ultimate balance on such settlement had been paid to him by the plaintiff Wilson. As regards this latter defence, the issues of fact were found in favour of the defendant upon the trial of the action; and the plaintiff Wilson having obtained a rule for a new trial on the ground of the verdict being against the evidence, such rule was discharged by the Common Pleas Division, and against that decision of the Common Pleas Division this appeal is in part brought. At the close of the argument we expressed our full concurrence in the conclusions at which the Common Pleas Division had arrived, and in the reasons assigned by them, and it is unnecessary to refer further to the appeal of the plaintiff Wilson.

The appeal of the plaintiff Arthur Brown, however, raises the more important question of the effect of the composition resolutions.

The facts of the case as regards the plaintiff Brown, are as follows:—He attended both meetings of the creditors of the defendant and signed the composition resolutions, his claim as a creditor for the sum of 942*l.* 11*s.* 1*d.* having been admitted by the chairman at the first meeting. In the statement of his affairs laid before such meeting, the defendant had inserted the plaintiff Brown under his trading style of "A. Brown & Co." as a partly secured creditor for the sum of 586*l.* 6*s.* 1*d.*; and it is admitted that neither this sum nor the sum of 942*l.* 11*s.* 1*d.*, the amount of his

proof, included the debt which is the subject of the present action, and which, for convenience, I will refer to as "the contingent debt."

I will first consider how this question would have stood, if the plaintiff Brown had been absent from the meetings, or, being present, had dissented from the composition resolutions. The 126th section of the Bankruptcy Act enacts that a composition resolution "shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors:" and, if the question, whether the plaintiff's claim was barred or not, depended upon the construction of these words, irrespective of the course taken by the plaintiff at the meetings, I think it is clear that the answer must be in the negative; for it appears to me that it would be extremely unreasonable to hold the resolution binding upon absent or dissenting creditors, if the amounts due to them were not accurately set forth in the debtor's statement.

But it is argued that, inasmuch as the 31st section of the Bankruptcy Act provides that, with certain exceptions not material to be mentioned, contingent debts and liabilities shall be provable in bankruptcy, and the 270th rule provides that all debts which would have been provable in bankruptcy shall be provable in composition proceedings, the contingent debt was a debt provable under the composition. In the view which I take of this case, it appears to me to be immaterial to consider whether this is so or not; the present question is, whether the plaintiff Brown is bound by the composition proceedings in respect of the contingent debt, and not whether, if he is bound, he could prove for its amount. The more forcible argument addressed to us on behalf of the defendant is that founded on the course pursued by the plaintiff Brown at the meetings.

I fully recognise the principle that a creditor, though not bound by the composition resolution, by reason of the omission of his name or address or the amount of his debt from the debtor's statement, may nevertheless so act that he must be held bound by the provisions of the resolution as fully as if his name and address and

1877

WILSON v. BRESLAUER.

C. A.

Baggallay, L.J.

the amount of his debt had been inserted. In the case of *Campbell* v. *Im Thurn* (1), a creditor so acting was held bound. In that case the name and address of the plaintiffs' firm were not included in the debtor's statement though the amount of their debt was included in the liabilities, but the plaintiffs claimed for the amount, and voted in respect of it at both meetings, and concurred in the appointment of a trustee; and it was held that by such acts they had agreed to be bound, and for that reason they were held bound. This was, I think, well put by my Brother Brett, when, in his judgment in that case, he said: "It seems to me that there are two kinds of creditors who may be bound by a composition under the section; those who are bound because they have agreed to be bound, and those who are bound though they have not agreed to be bound." (2) In my opinion, the latter class are bound under the provisions of the statute, and the former, by reason of their acts, become as bound as if they were within the statute. But in order that they may be so bound, it is essential that their acts should evidence their intention to adopt the composition resolutions, in other words, to be treated as "assenting creditors." It appears to me that in the present case the plaintiff Brown, though not within the provisions of the 126th section, as regards the debt of 942*l.* 11*s.* 1*d.*, inasmuch as the amount of such debt was not inserted in the defendant's statement, was nevertheless, by reason of his voting in respect of such debt, bound to the same extent as he would have been bound under the provisions of the 126th section if the amount of such debt had been inserted in the defendant's statement; but that as regards the contingent debt he is in no respect bound.

I think it clear that the plaintiff did not intend, and that the defendant could not have considered that he intended, to be so bound; the composition was only accepted upon the terms that it should be paid within one month from the 3rd of August, 1875, and it was known, both to the plaintiff and defendant, that the amount of the contingent debt could not be ascertained by that time. I fully assent to the view expressed by the judges in the Common Pleas Division that the claim in respect of the contingent debt would have been provable in bankruptcy, had the defendant

(1) 1 C. P. D. 267. (2) 1 C. P. D. at p. 274.

been declared bankrupt at the time of the commencement of the composition proceedings. I also think it possible that, had a different course been pursued, either by the plaintiff or by the defendant in relation to the composition proceedings, the claim might have been proved under them; but no such course has, in my opinion, been pursued by either the one or the other.

Under these cirumstances, I think that the judgment of the Common Pleas Division should be reversed, and that judgment should be entered for the plaintiff Brown.

Bramwell, L.J.

BRAMWELL, L.J. There are two ways in which a debtor may be discharged, as against a particular creditor, by a composition with his creditors in general. One is where the particular creditor assents to take the composition. In such case, though the proceedings are under the Bankruptcy Acts, the discharge is a discharge by the operation of the common law and the agreement of the parties. This is shewn by *Campbell* v. *Im Thurn.* (1) Now is there a discharge here by these means? That is to say, did Breslauer agree to pay and the plaintiffs to take a composition on the present claim? As a matter of actual fact, certainly not. The plaintiffs did not refuse to do so; neither party thought of it. I do not say they could not have agreed to it. On the contrary, I think they might have valued the claim and agreed that a composition should be paid and taken on the estimated amount. Other creditors might object; so they might to the admission of any debt or other claim. The only consequence would be they would refuse to agree to the composition. But if the debtor and creditor, or party liable and party entitled agreed, and there was no fraud on or objection by other creditors, it might be done. But it was not. It is urged that it is contrary to the policy of the law to allow a claim to be excepted from a composition. This is true in a sense. If a creditor insisted on a debt being excepted from a composition, or the debtor was willing it should be, in order to give a preference to the creditor, it would be a fraud on the other creditors and the agreement would be void. But if the exception of the debt or claim is not from such a motive there is no objection to it. In the present case it was because the parties did not think

(1) 1 C. P. D. 267.

1877

WILSON
v.
BRESLAUER.

C. A.

Bramwell, L.J.

that claim would ever arise. Even if we suppose that they had remembered it and had agreed that it was so remote and uncertain that it would be unfair to apply any of the debtor's assets to it, there would be nothing illegal in that. Suppose it had been put in the list of debts and the other creditors had objected, and it was then struck out, and a larger composition paid to the remaining creditors, would there be anything objectionable in that? Certainly not. Then the claim would remain. Moreover no such defence as this is set up or pleaded or proved. I am of opinion, therefore, that there is no discharge on the ground that the plaintiff Brown assented to the composition; no discharge, either on the ground that he has agreed to take a composition on this claim, or that he has fraudulently arranged for an undue preference.

The other way in which a debtor may be discharged by a composition is by force of the compulsory clauses of the Bankruptcy Act. Do they apply here? I think not. In the first place, the claim is not in the list. In the next place, the composition was not tendered at the proper time. But further, I have said that by agreement the claim might have been valued or fixed and put in the list; but without such agreement it could not be. A claim of indefinite amount cannot be put in. The machinery of the composition clauses supposes that there is a definite sum due. It is said that this is hard on the debtor or person liable. Well, so it is in this respect, that it gives only two modes instead of three of getting discharged from his debts and liabilities to a person who is under contingent liabilities which the person to whom he is liable will not agree to value. But, so far as that is a hardship, it arises from the nature of things. Further, it is said that the statute is to the contrary, because it says that all the debtors or persons liable shall be discharged by liquidation or composition from all debts or claims that might be proved in bankruptcy, and that this claim might be. It might, but that section must be read with a kind of reddendo singula singulis. That is, whatever debt or claim the machinery of liquidation or composition is adapted to shall be discharged by liquidation or composition. Then liquidation is applicable to all debts and claims; composition is not. If it is urged that it is contrary to the policy of the law, or fraudulent on other creditors, that a claim

should be excepted to give a preference, I repeat what I have said in considering the case of a voluntary acceptance of the composition. In short, the defendant and plaintiffs have not agreed to pay and take a composition on this claim, and it is not affected by the compulsory clauses, because it is not within the machinery provided, and therefore could not be so; nor, in fact, is it in the list, and there was no tender of the composition in time. If the argument of the defendant is good, whatever may be his willingness to pay something—and I can readily believe he is willing to pay 2*s.* in the pound to save the risk of having to pay more—the plaintiffs have lost this claim and all right to receive anything in respect of it. This really would be grossly unjust. If this could be set right, it has not been. They have bargained for nothing wrong. They are guilty of no fraud on the defendant, his creditors, or any one else. Nor are they guilty of any negligence; for it was the business of the defendant, if he wished to be discharged from his liabilities, to take effectual means for bringing that about.

I am, on these grounds, of opinion, that the judgment should be reversed.

*Appeal of plaintiff Wilson dismissed.*
*Judgment reversed, and entered for plaintiff Brown.* (1)

Solicitors for plaintiffs: *Lowless, Nelson, & Co.*
Solicitors for defendant: *Crook & Smith.*

(1) See *Melhado v. Watson*, ante, p. 281.

1877
*June 7.*

PATRICK *v.* MILNER AND ANOTHER.

*Conditions of Sale—Time, Essence of the Contract—Sale of Contingent Reversionary Interest in Railway Stock—Return of Deposit.*

The defendants, on the 6th of July, 1876, sold to the plaintiff by auction a reversion in railway stock, expectant on the decease of a married lady without issue who should attain the age of twenty-one years. The lady was then in her forty-fourth year, and had never had any children. The sale was subject to conditions, whereby it was provided that the purchaser should pay a deposit and the purchase be completed on or before the 17th of August then next; "but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchaser is (but without prejudice nevertheless to the vendor's rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of the purchase." By the seventh condition, should the purchaser neglect or fail to comply with any condition, "the deposit-money shall be forfeited and the vendor . . . . shall be at full liberty to resell the property . . . . and the deficiency (if any) arising by such second sale, together with all charges attending the same, shall be made good by the defaulter." There was no express stipulation that time should be of the essence of the contract. The plaintiff at the time of sale paid a deposit of 30*l.* The defendants were not able to complete the sale on or before the 17th of August, and the plaintiff two days afterwards brought his action to recover the deposit. The defendants were able and willing to complete the sale at the end of November, 1876:—

*Held,* that under the conditions time was not of the essence of the contract, and the plaintiff was not entitled to recover.

SPECIAL CASE.

The defendant Milner was an auctioneer carrying on business in London under the style of Marsh, Milner, & Co., and the defendant A. C. Scoles, a solicitor. The defendant Scoles had for some years acted as agent for R. Groom, then in Tasmania, and had managed his affairs in England under a general power of attorney dated the 9th of January, 1872. Groom was entitled to the reversion hereinafter described, and on the 6th of July, 1876, Scoles caused it to be put up for sale at public auction by the defendant Milner under general conditions applying to all lots then offered for sale. The conditions, so far as material, were as follows:—

"3rd. That the purchasers shall pay down immediately into the hands of Marsh, Milner, & Co., a deposit of 20*l.* per cent. in part of the purchase-money for each lot, and sign agreements for payment

of the remainder on or before the 17th of August next at the offices of the respective vendors' solicitors, when and where the purchases are to be completed; but should the completion of the purchases be delayed from any cause whatever beyond that period, the purchasers are (but without prejudice nevertheless to the vendors' rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of their purchase at the rate of 5*l.* per cent. per annum.

"4th. That the purchasers shall have proper conveyances, assignments, or transfers of the lots from all necessary parties at the expense of the purchasers on payment of the remainder of the purchase-money agreeably to the third condition, and will be entitled to all advantages on the reversions and policies from the hour of sale and to the current half-year's dividends or the interest on annuities, life interests, mortgages, shares, &c.

"7th. That should any or either of the purchasers neglect or fail to comply with any or either of the above conditions, or the conditions referred to below, the deposit-money shall be forfeited, and the vendors or vendor, as the case may require, shall be at full liberty to resell the property sold to such purchaser or purchasers either by public or private sale, and the deficiency (if any) arising by such second sale, together with all charges attending the same, shall be made good by the defaulter or defaulters at this present sale, and be recoverable as liquidated damages," &c.

In the catalogue of sale for the 6th of July, 1876, the reversion belonging to R. Groom was described as follows:—

"Lot 6. The reversion to a moiety of 920*l.* Great Western Railway Five per Cent. Consolidated Guaranteed Stock, expectant on the decease of a married lady, now in her forty-fourth year, dying without issue, or any she may have dying before attaining the age of twenty-one years. The tenant for life has been married nine years, and has never had any children. Duty at three per cent.

"Special condition as to Lot 6. The assignment or other necessary deed will be executed by Mr. Scoles under a power of attorney, the vendor being now resident in Tasmania. An attested

1877

PATRICK v. MILNER.

copy of the power of attorney will be supplied at the vendor's expense."

There was not in the general or special conditions or particulars any express stipulation that time was to be of the essence of the contract.

The plaintiff was the highest bidder for the above-mentioned reversion, and the same was knocked down to him for 150*l.*, and he thereupon paid to the defendant Milner 30*l.* as a deposit on account of the purchase, and received the following contract signed by him:—

"I, J. T. A. Patrick, . . . . do hereby acknowledge myself to be the purchaser of Lot 6, as described in the within particulars, at the auction held this 6th of July, 1876, and have paid 30*l.* as a deposit and in part payment of the said purchase. And I hereby contract and agree with the vendor to complete the purchase of the said lot in every respect agreeably to the within particulars and conditions of sale.

"Witness my hand this 6th of July, 1876.

| | | | |
|---|---|---|---|
| £150 | 0 | 0 | Amount of sale. |
| 30 | 0 | 0 | Deposit. |
| £120 | 0 | 0 | Balance. |

"We ratify this sale on behalf of Augustus Scoles, the vendor, and as auctioneers and stakeholders acknowledge the receipt of the deposit above mentioned.

"Marsh, Milner, & Co."

On the 7th of July, 1876, the defendant Scoles forwarded to the plaintiff an abstract of the vendor's title to the reversion, with a copy of the power of attorney of the 9th of January, 1872, and on the 14th of July the plaintiff objected by a letter to the defendant Scoles that the power of attorney contained no authority to deal with the reversion or execute an assignment, and demanded a return of the deposit of 30*l.* The defendant Scoles admitted, as the fact was, that the power of attorney did not authorize him to execute an assignment, but offered to send a deed of conveyance to Tasmania to be executed by the vendor, and on the plaintiff

refusing these terms he said he would obtain a special power to execute the assignment and complete the sale to the plaintiff: he also offered to waive all claim to interest upon the unpaid balance of the purchase-money.

On the 19th of August, 1876, the plaintiff issued a writ against the defendants for the return of the deposit. The defendant Milner claimed no interest in the matter in dispute, but was merely a stakeholder of the deposit.

The defendant Scoles afterwards procured from R. Groom, the vendor, a special power of attorney to complete the sale and to execute the assignment of the reversion. This power of attorney was dated the 20th of September, 1876, was received by the defendant Scoles on the 21st of November, 1876, and a copy furnished to the plaintiff on the following day. The plaintiff still declined to complete, and claimed the return of the deposit.

The questions for the opinion of the Court were, first, whether under the circumstances the plaintiff was entitled to the return of his deposit; or, in the alternative, secondly, whether he ought not to complete the contract.

During the argument it was admitted by the plaintiff's counsel that at the time of sale Scoles was in fact authorized to sell the reversion, R. Groom having requested him by letter so to do.

*Edward Ford* (*Poulter* with him), for the plaintiff. The defendant Scoles was not ready to complete on the 17th of August, and therefore in a court of common law the plaintiff would have been entitled to recover the deposit: 1 Dart on Vendors and Purchasers, 5th ed. ch. 10, s. 1, p. 417. It must be admitted that under the Supreme Court of Judicature Act, 1873, s. 25, subs. 7, which applies to all the divisions of the High Court of Justice, a stipulation as to time is not to be deemed of the essence of the contract, except in those cases where before that statute it would have been so construed in a court of equity; but upon the sale of a reversion, time has always been deemed in a court of equity to be of the essence of the contract: 1 Dart on Vendors and Purchasers, 5th ed. ch. 10, s. 1, p, 419; *Newman* v. *Rogers* (1); *Hipwell* v. *Knight* (2); and here the reversion sold is contingent, as

(1) 4 Bro. C. C. 391.

(2) 1 Y. & C. Ex. in Eq. 401, at p. 416.

1877

PATRICK v. MILNER.

it may be defeated upon the birth of a child who shall attain the age of twenty-one years.

[LOPES, J. When the vendor was in default, the proper course for the plaintiff, as purchaser, to take was to give the defendant Scoles notice to complete the sale within a reasonable time: Sugden on Vendors and Purchasers, 14th ed. ch. 6, s. 3, par. 15, p. 268; but no notice was given, and the writ was issued two days after the day appointed for the completion of the sale.]

No notice to complete was necessary, the parties having fixed peremptorily a time to carry out the sale; and it is clear that by agreement time may be made of the essence of the contract: *Boehm* v. *Wood.* (1) The cases of *Wells* v. *Maxwell* (No. 1) (2) and *Webb* v. *Hughes* (3), which may perhaps be relied on by the defendants, are not in point, for *Wells* v. *Maxwell* (2) related to the sale of land with possession, and *Webb* v. *Hughes* (3) to the sale of a residence. Whenever the property sold is of an uncertain or fluctuating value, the contract must be completed at the prescribed time: *Day* v. *Luhke.* (4) If the plaintiff, as purchaser, is forced to accept the conveyance of the reversion, he may at the option of the vendor be compelled to undergo the hardship of having to pay interest upon the balance of the purchase-money: for under the last clause of the third condition he would be relieved from the payment of interest only if the vendor should be guilty of wilful default: 1 Dart on Vendors and Purchasers, 5th ed. ch. 4, s. 3, p. 127, and 2 Ibid. ch. 13, s. 4, p. 636; *Greenwood* v. *Churchill* (5); *Lord Palmerston* v. *Turner.* (6)

*Meadows White, Q.C.* (*F. Pain* with him), for the defendants. First, no deed for the formal conveyance of the property sold was necessary; for a reversion in railway stock is merely an equitable interest, and does not fall within the words of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 14, which requires a deed to be executed for the transfer of shares or stock. As it is admitted that at the time of sale Scoles was in fact authorized to assign the reversion, the purchase might have been

(1) 1 Jac. & W. 419.
(2) 32 Beav. 408.
(3) Law Rep. 10 Eq. 281.
(4) Law Rep. 5 Eq. 336; *Day* v. *Luhke* was approved of in *Claydon* v. *Green*, Law Rep. 3 C. P. 511, and in *Cowles* v. *Gale*, Law Rep. 7 Ch. 12.
(5) 8 Beav. 413.
(6) 33 Beav. 524.

completed upon the 17th of August without any deed. Therefore the objection to the title raised by the plaintiff on the 14th of July was illusory, and the defendants are entitled to judgment on the ground that the defendant Scoles was able and willing to convey on the appointed day.

[GROVE, J. The defendants cannot succeed on this ground. The fourth condition seems to point to the execution of a deed by or on behalf of the vendor. In any view the parties proceeded upon the assumption that a deed was necessary to perfect the conveyance of the reversion; and it appears that the power of attorney authorizing Scoles to execute an assignment was not received by him until the 21st of November, three months after the appointed day.]

Secondly, time was not of the essence of the contract. *Webb* v. *Hughes* (1) is a direct authority for the defendants. Time becomes only of the essence of the contract when it has been made so by direct stipulation or necessary implication: *Parkin* v. *Thorold.* (2) The stipulation that the purchaser should pay interest was proper, for the reversion became more valuable from lapse of time: *Child* v. *Lord Abingdon.* (3) The delay was not unreasonable; and it may well be that owing to the seventh condition time is of the essence of the contract as against the purchaser, although it is not so as against the vendor.

*Ford,* in reply. A deed was necessary to complete the assignment to the plaintiff; for he, as purchaser, could claim from the vendor the protection of covenants for title. It is of no consequence that the defendant Scoles could make a perfect conveyance of the reversion after action brought: *Cornish* v. *Rowley* (4); the material day was the 17th of August, when he was bound to be ready to complete.

GROVE, J. The real question arising upon this case, in the form in which it is presented to us, is whether time is of the essence of the contract; and the authorities shew that this question depends upon the nature of the property, upon the construction of the con-

(1) Law Rep. 10 Eq. 281.
(2) 16 Beav. 59, at p. 65.
(3) 1 Ves. Jun. 94.
(4) 1 Selw. N. P. ch. vii. pp. 218, 219, 13th ed.

1877

PATRICK v. MILNER.

tract, and upon the objects which the parties had in entering into it, or, as it may be better expressed, upon what must be judicially assumed to have been their intention; for that may sometimes be different from their actual intention. In the present case the dispute has arisen out of the sale of a reversion in railway stock. The reversion is contingent, that is, it is expectant upon the death without issue who shall attain the age of twenty-one years of a woman aged forty-three years, who has been married nine years and has never had any issue; it is therefore a reversion which, it is highly probable, will ultimately come into possession. The sale was subject to certain conditions, the third of which provided as follows: "The purchasers shall pay down immediately into the hands of Marsh, Milner, & Co., a deposit of 20*l.* per cent. in part of the purchase-money for each lot and sign agreements for payment of the remainder on or before the 17th of August next at the offices of the respective vendors' solicitors, when and where the purchases are to be completed." Pausing here for a moment, I incline to think that if the condition had stopped there, fair ground would have existed for contending that the parties must be taken to have intended that time should be of the essence of the contract; for the authorities cited during the argument seem to shew that it is imperative to complete the sale of a reversion within the appointed time; but then the subsequent words put a very different complexion on the case, "but should the completion of the purchases be delayed from any cause whatever beyond that period, the purchasers are (but without prejudice nevertheless to the vendors' rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of their purchase at the rate of 5*l.* per cent. per annum." Now these latter words, which form the final clause of the third condition, make it quite clear that the parties to the sale contemplated the possible occurrence of a delay in completing the contract, and that they intended, in the event of that delay happening, to keep alive the bargain which had been entered into. In the present case no question arises as to whether the delay which did take place was unreasonable, and it has been admitted that Scoles at the time of the sale had been in fact authorized to sell; consequently the only

difficulty was as to the form of the conveyance. I therefore think that in the present case time was not of the essence of the contract. *Parkin* v. *Thorold* (1) shews the rule to be that time is not of the essence of the contract unless it is made so by direct stipulation or necessary implication. In *Webb* v. *Hughes* (2) it was contended on behalf of the vendor that the purchaser had waived the delay occurring through the default of the vendor, and Vice-Chancellor Malins held that there had been waiver. No question as to waiver has been or could be raised before us; but the conditions in that case were very similar to the conditions in the present action, and the Vice-Chancellor there (3), expressed an opinion that the agreement between the parties did not make time of the essence of the contract, "because the very condition shews that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase." The condition alluded to was in fact identical with the third condition mentioned in the special case, except that it did not contain the words within brackets, "but without prejudice nevertheless to the vendors' rights under the seventh or any other condition of sale." The seventh condition provides, that if a purchaser fails to comply with the conditions, the deposit-money shall be forfeited and the vendor may resell. At first sight this seems to favour the view on behalf of the plaintiff; but upon full consideration I do not think that it alters the implication necessarily arising upon the provision in the third condition as to the payment of interest upon the balance of the purchase-money, which plainly contemplates that the sale may not be completed upon the 17th of August. The seventh condition may be considered as a saving clause introduced for the benefit of the vendor; but it does not seem to me to shew that the bargain was incapable of being kept alive after the 17th of August, and that it might not be carried on for some time longer. There is no direct stipulation that time shall be of the essence of the contract, and the implication is, to my mind, very strong that the parties did not intend it to be so. Upon this short ground I am of opinion that the defendants are entitled to our

(1) 16 Beav. 59. (2) Law Rep. 10 Eq. 281.
(3) Law Rep. 10 Eq. 286.

1877

PATRICK v. MILNER.

judgment. We cannot take into consideration the question of hardship.

LOPES, J. The only matter for our determination is whether time was of the essence of the contract entered into by the parties; if it was, the plaintiff will succeed; if it was not, the defendants are entitled to judgment. Formerly, in courts of equity, time was not deemed of the essence of the contract, unless it had been made so by express stipulation or necessary implication. This rule now applies in all the divisions of the High Court of Justice. I think that the authorities cited in the course of the argument establish that unless a contrary intention is apparent, upon the sale of a contingent reversionary interest time is to be deemed of the essence of the contract; and therefore primâ facie the plaintiff is entitled to succeed. But then the last clause of the third condition clearly shews that the parties contemplated that there might be a delay in completing the sale, and that the execution of the necessary documents might be postponed until after the 17th of August. The present case seems to me practically on all fours with *Webb* v. *Hughes*. (1) The only distinction is that in that case the conditions do not appear to have contained the words within brackets occurring in the third condition set out in the special case before us; but I do not think that they constitute such a difference as to enable us to say that *Webb* v. *Hughes* (1) is not an authority to be followed in the present action. The defendants are entitled to succeed.

*Judgment for the defendants.*

Plaintiff in person.

Solicitor for defendants: *A. C. Scoles.*

(1) Law Rep. 10 Eq. 281.

DANIEL, APPELLANT; JANES, RESPONDENT. 1877

*Malicious Injury to Property*—24 & 25 *Vict. c.* 97, *s.* 41—*Placing Poisoned Flesh in Inclosed Land*—27 & 28 *Vict. c.* 115, *s.* 2. *May* 2.

The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under 24 & 25 Vict. c. 97, s. 41.

But, *semble* that it is within 27 & 28 Vict. c. 115, s. 2.

CASE stated by a Metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellant was summoned to the Hammersmith police court to answer a complaint preferred by the respondent under 24 & 25 Vict. c. 97, s. 41, for that he (the appellant) did unlawfully and maliciously kill a dog the property of the respondent. At the hearing the following facts were proved or admitted:—

The appellant was owner of a garden imperfectly fenced by a quickset hedge in which there were holes large enough to allow a dog to pass through. The respondent's dog strayed in the appellant's garden, by reason of such defects of the appellant's fence. On Monday, the 27th of November last, the appellant told the respondent that, if he did not keep his dog from running into the garden, he should put poisoned meat there. On Friday, the 1st of December, the appellant knowingly, wilfully, and maliciously placed a piece of flesh impregnated with poison on the garden, with the express intention and design of killing the dog. The dog, straying into the appellant's garden by reason of the said defects of the appellant's fence, did eat the poisoned flesh, and was killed thereby.

On behalf of the appellant it was admitted that he had placed poisoned meat in his garden with the intention of killing the dog; and it was contended that he had a legal right to place it there. The case of *Jordin* v. *Crump* (1) and the 3rd section of The Poisoned Flesh Act (27 & 28 Vict. 115), were quoted by the appellant in support of this contention. (2) It was further contended

(1) 8 M. & W. 782; 11 L. J. (Ex.) 74.

(2) 27 & 28 Vict. c. 115, s. 3, "Nothing in this Act shall make it unlawful for the occupier of any dwelling-house or other building, or the owner of any rick or stack of wheat,

1877

DANIEL v. JANES.

that the notice given by the appellant to the respondent that, unless he kept the dog from trespassing in the garden poisoned meat would be placed there, disproved any malicious intent.

The magistrate was of opinion,—1. That, as the case of *Jordin* v. *Crump* (1) was decided before the passing of the Act under which the appellant was charged, it had no application.—2. That 27 & 28 Vict. c. 115, makes the knowingly and wilfully placing of such poisoned meat upon any land unlawful, save as excepted in the Act.—3. That, taking into consideration the context and the provision for protecting drains in which poison had been placed by gratings to prevent the entrance of dogs, the appellant's garden so imperfectly fenced as aforesaid was not an "inclosed garden" within the meaning of the exception of the Act.—4. He found as a fact that, whether the garden was an "inclosed garden" or not, the poisoned flesh was not placed there "for the destruction of rats, mice, or other small vermin," but knowingly, wilfully, and maliciously, for the express purpose of killing the dog.

He was therefore of opinion that the provisions of the second Act did not form any defence, and that the appellant was guilty of unlawfully and maliciously killing the dog; and that the fact that the appellant had given notice to the respondent that, unless he kept the dog from trespassing in the garden, poisoned meat would be placed there, did not disprove his malicious intent. He accordingly convicted the appellant of the offence of unlawfully and maliciously killing the dog.

If the Court should be of opinion that, upon the facts above stated, the appellant was lawfully entitled to kill the dog, the conviction was to be quashed; otherwise to remain in force.

*Buszard, Q.C.*, for the appellant. The facts proved and admitted before the magistrate do not bring the appellant within the terms

---

barley, oats, beans, peas, tares, seed, or of any cultivated vegetable produce, to put or place, or cause to be put or placed, in any such dwelling-house or other building, or in any inclosed garden attached to such dwelling-house, or in the drains connected with any such dwelling-house, provided that such drains are so protected with gratings or otherwise as to prevent any dog entering the same, or within such rick or stack, any poison or poisonous ingredient or preparation for the destruction of rats, mice, or other small vermin."

(1) 8 M. & W. 782; 11 L. J. (Ex.) 74.

of the enactment under which the conviction took place. Sect. 41 of 24 & 25 Vict. c. 97, is a highly penal enactment,—"Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet:" and the term of imprisonment is twelve months for a second offence. The words "unlawfully and maliciously," in that section, are to be construed strictly: the killing there referred to, to warrant a conviction, must be such a killing as in the case of a human being would amount to murder, or at the least to manslaughter, and cannot be referred to a case where the sole object is the protection of a man's premises and property.

The respondent did not appear.

LORD COLERIDGE, C.J. The conviction in this case is clearly wrong. I agree with Mr. Buszard that the 41st section of the Act upon which the conviction proceeded points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to simply for the purpose of indulging a cruel disposition, and not to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given. The 2nd section of 27 & 28 Vict. c. 115, however, is a totally different provision: it enacts that "every person who shall knowingly and wilfully set, lay, put, or place, or cause to be set, laid, put, or placed in or upon any land any flesh or meat which has been mixed with or steeped in or impregnated with poison or any poisonous ingredient so as to render such flesh or meat poisonous and calculated to destroy life, shall, upon a summary conviction thereof, forfeit any sum not exceeding 10*l.*, to be recovered in the manner provided by the Poisoned Grain Prohibition Act, 1863" (26 & 27 Vict. c. 113). This latter enactment would seem to shew that what was done

1877

DANIEL v. JANES.

here was an unlawful act; but that question is not now before us. I think the decision of the magistrate must be reversed.

LINDLEY, J. I am of the same opinion. I cannot come to the conclusion that that which is charged here was an offence within the meaning of s. 41 of 24 & 25 Vict. c. 97. I am, however, inclined to agree that it was an unlawful act within the provision in the subsequent Act.

*Conviction quashed.*

Solicitor for appellant: *H. J. Liggins.*

---

*April* 10.

[IN THE COURT OF APPEAL.]

CREEN *v.* WRIGHT.

*Practice—Order LV.—Costs of Abortive Trial—New Trial—Costs to "follow event."*

Where on the trial of an action a nonsuit is directed which is set aside and a new trial granted, and on the second trial the plaintiff has a verdict and judgment, the plaintiff is entitled to the costs of the first trial and of the rule for a new trial as part of the costs which "follow the event," under the latter part of Order LV.

ON the trial of this action before Lush, J., after the Judicature Acts came into operation, the learned judge directed a nonsuit. The nonsuit was set aside, and a new trial granted (1); and on the second trial before Bramwell, B., the plaintiff obtained a verdict for 60*l.* and judgment. No order was made as to costs.

On taxation, the district registrar disallowed the plaintiff his costs of the first trial, and of the rule for a new trial; and an application was made to the Common Pleas Division to review this taxation, under Order LV., or for a substantive order as to the costs of the first trial.

The Common Pleas Division refused to make any order, intimating that it was a question which ought at once to be settled by the Court of Appeal; and the plaintiff accordingly appealed.

*Herschell, Q.C.*, for the plaintiff. By Order LV. where there has been a trial by jury the costs are, as a general rule, to follow the event; and the Court of Appeal has determined that, as a general

(1) See 1 C. P. D. 591.

rule, the party ultimately successful should get all the costs. (1) Here the plaintiff was right from the beginning, the whole is but one litigation.

[BRAMWELL, L.J. Suppose the question had been on the record, the plaintiff would, according to the present rules, have got all the costs.]

*J. Edwards, Q.C.*, for the defendant. The costs of the nonsuit have no reference to the event of the second trial. The event of the first trial was the nonsuit.

[BRAMWELL, L.J. That argument would go the length of giving the defendant the costs of the abortive nonsuit.]

At most it is a question in the discretion of the Court, under the first part of the order, which party shall pay the costs.

[LORD COLERIDGE, C.J., referred to *Parsons* v. *Tinling* (2).]

LORD COLERIDGE, C.J. I am of opinion that the plaintiff is entitled to these costs, as part of the costs that abide the event, that is the ultimate event of the trial, the whole being but one litigation. Order LV. directs that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court .... provided that where any action is tried by a jury, the costs shall follow the event, unless the judge or Court otherwise order." Here there has been no exercise of discretion, the order being merely refused for the purpose of appeal. The question, therefore, is what is the ordinary rule, what are the costs, and what the event which they are to follow. In my opinion the event is the ultimate event of the second verdict, and the costs are all the costs of, and incident to, the proceedings leading up to that event, including the costs of the first trial. If the action had ended with the nonsuit, that would have been the event; but as it was set aside we must treat it as if it had not taken place. Therefore, the plaintiff is entitled to have these costs taxed.

BRAMWELL, L.J. I am of the same opinion, and for the same reasons. And I say further, I think that if the Order were not there, the successful plaintiff ought to be entitled to get these costs; because the proceedings taken by the plaintiff have been bonâ fide and properly taken to enforce the rights which the verdict of the

(1) See 1 Ch. D. 41.

(2) Ante, p. 119; since overruled by *Garnet* v. *Bradley*, 2 Ex. D. 349.

1877

CREEN v. WRIGHT.

jury has found him entitled to, and it was no fault of his that he was unsuccessful in the first instance. The analogy of the point being on the record applies. If the question had been decided as a matter of law on the record, the plaintiff being ultimately successful would have been entitled to all the costs; and why should he not get them when the nonsuit is set aside and he is ultimately decided to be right by the verdict of the jury?

BRETT, L.J. I am of the same opinion. I am desirous to guard against being supposed to express any opinion as to the case in the Common Pleas Division. The grounds of that decision are inapplicable to this case; and it is also unnecessary to determine whether the meaning of the word "event" given in that case was right, or what meaning is to be given. But I think on the true interpretation of Order LV., as applicable to the facts of this case, the plaintiff should be held entitled to all costs. The decision at the first trial was in favour of the defendant, and I do not draw any distinction between a case in which the event of the trial is arrived at by the action of the judge, and when by the action of the jury. But that decision in favour of the defendant was set aside; and the verdict of the jury on the second trial clearly is the event within the proviso of the Order. That event is in favour of the plaintiff, and he is entitled to the costs so far as the second trial is concerned, as the costs follow the event, whatever is the meaning of event. What then are the costs? I think all the costs of and incident to the proceedings, that is, all costs that have been fairly incurred in the course of the action. But then as to the first trial. Is any part of the proviso applicable to the first trial? I think that there has been no event of the first trial which the costs can follow, for the nonsuit has been set aside, and it must be treated as if it had never occurred. I think then all the costs of the proceedings follow the event of the second trial, and the plaintiff is entitled to the costs of the first trial.

*Order absolute to review taxation.*

Solicitors for plaintiff: *Neal & Philpot, for Evans & Lockett, Liverpool.*

Solicitors for defendant: *Gregory, Rowcliffes, & Co., for Hull, Stone, & Fletcher, Liverpool.*

## RAYNER *v.* MITCHELL.

1877
*May* 2.

*Master and Servant—Negligence—Scope of Employment.*

The defendant's carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out the defendant's horse and cart, and on his way home negligently ran against the plaintiff's cab and damaged it. The course of the employment of the carman was, that, with the defendant's horse and cart, he took out beer to customers of the defendant (a brewer), and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from the defendant a gratuity of 1*d.* each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public-house which his master supplied, and for which he afterwards received the customary 1*d.*:—

*Held*, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable.

Appeal from the decision of the county court of Yorkshire, holden at Leeds.

This action was originally brought in the Exchequer Division to recover damages for injury done to the plaintiff's cab by the negligent driving of the defendant's servant, and was remitted for trial in the Leeds county court.

At the trial it was proved that on the 5th of March, 1875, the plaintiff's driver, Alfred Wadsworth, was in the course of his employment going in the direction of Roundhay. He was on his near or right side, when, observing the defendant's horse and cart coming rapidly towards him on the wrong side of the road, he called out so as to give warning, and drew up on the foot-path. While in this position, the horse and cart of the defendant came in contact with the plaintiff's cab, and did the injury complained of.

The course of the employment of the defendant's driver was that, with the defendant's horse and cart, he took out beer to private customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant.

On this particular day, the 5th of March, 1875, the defendant's driver had, without permission, taken the defendant's horse and

1877

RAYNER v. MITCHELL.

cart out of his master's stables for a purpose of his own, viz. to deliver a child's coffin at a relative's house at Roundhay, and, having accomplished his purpose, was returning home to Leeds.

Before the accident happened the defendant's servant had called at a public-house which the defendant supplied with beer, to inquire for empty barrels, and, having obtained one or two, he continued his journey to his master's brewery. Shortly after this he swerved from his own side of the road, and, proceeding at a rapid pace, drove on to the plaintiff's cab, and did the injury complained of; and the county court judge found from the facts before him that there was no contributory negligence on the part of the plaintiff's servant, and that the defendant had received the casks collected from the servant, and given him the agreed price for such collection. He therefore gave judgment for the plaintiff.

The question for the opinion of the Court was, whether upon the above facts the defendant was liable for the negligence of the driver of his horse and cart.

*Cyril Dodd*, for the defendant. The servant was not at the time of the happening of the accident either expressly or impliedly engaged in his master's business or service. He had taken out the horse and cart for a private purpose of his own, without the knowledge or permission of his master. The true principle is that stated by Cockburn, C.J, in *Storey* v. *Ashton* (1), "I think, the judgments of Maule and Cresswell, JJ., in *Mitchell* v. *Crassweller* (2) express the true view of the law, and the view which we ought to abide by.—The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as a servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey

(1) Law Rep. 4 Q. B. 476, 479. (2) 13 C. B. 237; 22 L. J. (C.P.) 100.

which had nothing at all to do with his employment." *Patten* v. *Rea* (1) has no application: the servant there was acting in a manner sanctioned by his employer. Some stress seems to have been laid by the judge upon the fact of the defendant having paid the servant the customary 1*d.* for each cask brought home on the occasion in question. But, apart from the objection that this is relying upon a ratification of a tort, there can be no ratification without a knowledge of all the circumstances.

*Hope*, for the plaintiff. When the servant originally started, it must be conceded he was not acting in the business of his master. But, at the time the accident happened, he was in the act of performing a part of his ordinary duty.

[LORD COLERIDGE, C.J. The question submitted to us is, whether upon the facts found the defendant was liable for his servant's negligence. The real question is, was there any evidence to warrant the learned judge in finding that the man was acting in the course of his employment.]

In *Patten* v. *Rea* (2), Williams, J., says: "It clearly is not necessary in cases of this sort that there should be any *express* request: the jury may imply a request or assent from the general nature of the servant's duty and employment." In the words of Jervis, C.J., in *Mitchell* v. *Crassweller* (3), to render the master liable, it is enough if the servant was in the master's employ at the time of committing the grievance.

*Dodd* replied.

LORD COLERIDGE, C.J. The cases which have arisen upon this subject have from the earliest time been productive of much astute and interesting discussion in Courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves. There is, however, no doubt as to the true principle which ought to guide us. It was laid down in Lord Holt's time, and repeatedly since, that, wherever the master intrusts a horse or carriage, or anything which may readily be made

(1) 2 C. B. (N.S.) 606; 26 L. J. (C.P.) 235.

(2) 2 C. B. (N.S.) at p. 614.

(3) 13 C. B. at p. 246.

1877

RAYNER v. MITCHELL.

an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. That is undoubtedly a correct statement of the law; and, applying that principle here, the question is whether the act done by the servant in this case which caused damage to the plaintiff, was done by him in the course of his employment by his master, the defendant. My decision in this case depends upon the finding of the county court judge. He finds that "the course of the employment of the defendant's driver was, that, with the defendant's horse and cart, he took out beer to customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant." That is a clear and distinct finding as to the scope of the servant's employment. Then, did this accident happen whilst the servant was acting in the course of that employment? Certainly not. He went out with the horse and cart without the knowledge or permission of his master, and not upon his master's business, but for his own private purpose, viz. to deliver a child's coffin at the house of a relative at Roundhay; and, coming home after having accomplished that purpose, he called at a public-house which the defendant supplied with beer, and there picked up one or two empty casks, which he brought home to the brewery. The sole question is whether, having started out on a journey for his own purposes in the way described, did the fact that, in returning home, the servant took up some empty casks constitute a re-entering upon his ordinary duties, as the learned judge phrases it; or, in other words, did it convert the journey into a journey made in the ordinary course of his employment, so as to make his master responsible for his negligence? In substance and good sense I think it did not. I cannot, therefore, agree with the conclusion of the learned judge, that, at the time the damage complained of was done, the man was engaged in his master's employment. I think the judgment should be reversed.

LINDLEY, J. I am of the same opinion. The question submitted for the opinion of the Court is, whether upon the facts stated the defendant is liable for the negligence of the driver of his horse and cart. One of the facts upon which that question is based is the statement of the course of the servant's employment, which is, that, "with the defendant's horse and cart, he took out beer to private customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant." The question is whether, upon that distinct statement of the servant's employment, the master is responsible for an accident happening in the manner stated? I think he is not. Treating it either as a question purely of fact or as a mixed question of law and fact, when did the man enter upon the course of his employment? If the accident had happened whilst the servant was returning home not having collected the empties, it is plain that the defendant would not have been liable: the man clearly could not then have been said to have been in his master's employ. Does it alter the case, that, while going back, he picks up a cask or two? The inference I draw from the facts found in the case is, that the servant was engaged, as well on his return as on his outward journey, upon his own private business; and that that journey cannot by the mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment. I think he could not in any sense be said to be acting in his master's business; and that is the question which the county court judge intended to submit to us. I think he drew an erroneous inference from the facts when he found that the injury was done while the servant was engaged in his master's employment. The defendant is entitled to judgment, with costs.

*Judgment for the defendant.*

Solicitor for plaintiff: *G. J. Brownlow, for Keenlyside & Forster, Newcastle-upon-Tyne.*

Solicitor for defendant: *John Scott, for C. J. Garbutt, Newcastle-upon-Tyne.*

1877
*April* 17.

CATLOW, Administrator, *v.* CATLOW.

*Solicitor and Client—Charge for Costs—Property recovered or preserved—23 & 24 Vict. c. 127, s. 28.*

8 C.L.D. 403
3 C.P.D. 253
6 Q.B.D. 623.
24 C.L.D. 551
554

A., as administrator of his deceased mother, sued B. and C. (his brother and sister) in the Common Pleas at Lancaster, in detinue for goods belonging to the estate of the intestate, and recovered a verdict and judgment against them, but was unable to levy. Afterwards B. and C. sued out a plaint in a county court for administration of the estate, and brought into court the proceeds of the goods of the intestate, which they had hitherto concealed:—

*Held*, that the solicitor who acted for A. in the action of detinue was entitled to a charge or lien upon the fund in the hands of the registrar of the county court, under 23 & 24 Vict. c. 127, s. 28, as "property recovered or preserved through his instrumentality," in respect of his costs incurred by him, to be taxed as between attorney and client; and that this was the proper Court in which to make the application.

Mrs. Ann Catlow died intestate on the 29th of January, 1869. On the 21st of September in the same year letters of administration were granted to John Catlow, her eldest son, in the Lancashire District Registry of the Court of Probate, and Thomas Catlow and John Oldham became sureties in the administration bond.

In June, 1870, John Catlow, as administrator, brought an action of detinue in the Court of Common Pleas at Lancaster against Thomas Catlow, William Catlow, and Elizabeth Catlow, to recover certain scrip or shares in the Accrington Gas and Waterworks Company, and also certain household furniture, goods, and effects which had belonged to the intestate. The trial took place at the Lancaster Summer Assizes in that year, when a verdict was found for the plaintiff for 282*l.*, and the judge ordered that execution should issue for the return of the scrip, goods, and effects, under s. 78 of the Common Law Procedure Act, 1854; and in September execution was duly issued against Thomas and William Catlow. Nothing, however, was realized under that execution.

In December, 1875, Thomas Catlow issued a plaint out of the Blackburn County Court against John Catlow for administration of the estate; and the scrip, goods, and effects which were the

subject of the above-mentioned action were delivered up to the registrar of that court to be administered. The proceedings in that suit are now pending, the scrip and goods having been sold and the money brought into court.

A bill of costs in the action of detinue, amounting to 91*l.* 10*s.* 2*d.*, was delivered by Mr. Barlow, solicitor to the plaintiff in that action, and was on the 9th of August, 1870, taxed as between party and party at the sum of 65*l.* 15*s.* 11*d.* In July, 1875, Barlow brought an action in the Court of Common Pleas at Lancaster against John Catlow to recover 121*l.* 4*s.* 1*d.*, the costs of the above-mentioned action and also the costs incurred in respect of professional services rendered by him to John Catlow in reference to proceedings instituted by Thomas Catlow in relation to the intestate's estate; and judgment was obtained by him against John Catlow for that sum and 4*l.* for costs. This judgment remaining unsatisfied,

*Crompton*, in the last Hilary Sittings, obtained a rule, under s. 28 of 23 & 24 Vict. c. 127 (1), calling upon the plaintiff and the defendants in the action of detinue to shew cause why an order charging the property the subject of that action with the costs, charges,

(1) Sect. 28 of 23 & 24 Vict. c. 127, enacts that, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved: and, upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely null and of no effect as against such charge or right: Provided always that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations."

1877

CATLOW v. CATLOW.

and expenses of Mr. Barlow, amounting to 91*l.* 10*s.* 2*d.*, should not be made.

*M'Leod* shewed cause on behalf of the defendants. (1) The applicant does not bring himself within the terms of the statute. No property has been recovered or preserved through his instrumentality. The litigation conducted by him produced no result.

[GROVE, J. He recovered judgment in the action, though the defendants were for a time successful in preventing the proceeds from being realized. What more can a solicitor do to give him a charge upon the property for his costs?

LINDLEY, J. The defendants should not have fought the action of detinue. They should have filed a petition at once to have the estate administered. The registrar of the county court holds the property as trustee for John Catlow.]

Then, the application is not made to the proper tribunal or at the proper time. The words of s. 28 are, "It shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such solicitor entitled to a charge upon the property recovered or preserved," &c. That means the tribunal which has seisin of the matter. The proper Court, therefore, to which the application should have been made was the Court of Common Pleas at Lancaster; and the time, at the assizes when the case was tried. If John Catlow has got the effects the matter cannot in any sense be said to be depending.

*Channell*, for the parties to the administration suit other than John Catlow. The defendants in the action of detinue are the persons whose interests should be charged with Barlow's lien, if any. Instead of causing the estate to be administered at once, they defended the action and so improperly incurred these costs.

[LINDLEY, J. I am very much disposed to agree to that. But, can we deal with that matter here? Is it not to be worked out

(1) It appeared from the affidavit filed in opposition to the rule that Ann Catlow, the intestate, left eight sons and daughters living at the time of her decease, and that the whole estate realized in the admistration suit amounted to 532*l.* 10*s.*

in the administration suit in the county court? The only order we can make is, I think, an order charging the fund.]

The order may be made "without prejudice to any application to the county court to apportion the charge equitably."

*Crompton*, in support of the rule. The case of *Scholefield* v. *Lockwood* (1) is a distinct authority to shew that the present claim is within the statute. And the Act is, as was said by the Master of the Rolls in that case (2), "intended to be construed liberally, and solicitors ought not to be deprived of their lien in these matters when there has been a good deal of work done. If there is anything coming out of the estate to the bankrupt, and that has been preserved by the solicitor, he is entitled to his lien." The circumstance of the fund being the subject of an administration suit in another Court makes no difference; for, in *Wilson* v. *Hood, Re Seaman* (3), the attorney for a successful litigant was declared by the Court in which the action was brought to be entitled to a charge upon the property recovered through his instrumentality, for the amount of his taxed costs in the action, although the estate of his client (who had died since the action) was being administered in the Court of Chancery. As against John Catlow, at all events, the applicant is entitled to his costs as between solicitor and client; and the order of the Court, following the words of the statute, will charge the fund to that extent.

GROVE, J. In this case I am of opinion that the rule to shew cause why an order should not be made charging the property the subject of the action of detinue brought by John Catlow in the Court of Common Pleas at Lancaster, against Thomas, William, and Elizabeth Catlow, should be made absolute. It appears that Ann Catlow died in January, 1869; that letters of administration were granted to her eldest son, John Catlow, in September in the same year; that, in June, 1870, John Catlow employed Mr. Barlow as his solicitor to recover from his two brothers and his sister certain goods and effects of the intestate; and that an action

(1) Law Rep. 7 Eq. 83. (2) At p. 87.
(3) 33 L. J. (Ex.) 204; 3 H. & C. 148.

1877

CATLOW v. CATLOW.

was accordingly brought in which the plaintiff obtained a verdict for 282*l.*, as the value of the goods detained by them belonging to the estate of the intestate, and an execution issued for that sum and costs, but produced no results, the effects being concealed by the defendants. In December, 1875, Thomas Catlow (one of the defendants in the action) issued a plaint out of the county court at Blackburn against John Catlow for administration of the estate, and ultimately the goods which were the subject of the action of detinue were delivered up to the registrar of the court, to be administered. Mr. Barlow now applies to us, under s. 28 of 23 & 24 Vict. c. 127, for an order charging those effects with the amount of his taxed costs in the original action which he prosecuted successfully so far as judgment and execution were concerned, although through the misconduct of the defendants he failed to reap the fruits of the execution. I am of opinion that Mr. Barlow is entitled to the order he asks for.

It was contended by Mr. M'Leod, that, inasmuch as the property was not actually realized in the action of detinue, it was not "recovered or preserved through the instrumentality of the solicitor," within the meaning of the statute. I am clearly of opinion that it was recovered, in the usual sense of that expression; and in one sense I incline to think it was preserved through the instrumentality of Mr. Barlow. The result of the proceedings instituted by him gave his client a right to the property: it was not necessary that the solicitor should absolutely obtain possession of it. It was kept back by the defendants, who are now seeking to take advantage of their own wrong. So far as the first point is concerned, I am of opinion that the plaintiff's claim is established. *Scholefield* v. *Lockwood* (1) is fully in point upon this question.

The next argument was founded upon the words of the section, "it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare the solicitor entitled to a charge," &c. It is said that this Court,—the Common Pleas Division,—has not the matter depending before it. But the case of *Wilson* v. *Hood* (2) is decisive as to that, though I must confess I should have been of

(1) Law Rep. 7 Eq. 83. (2) 3 H. & C. 148; 33 L. J. (Ex.) 204.

1877

CATLOW v. CATLOW.

the same opinion without that case. The jurisdiction of the Court of Common Pleas at Lancaster is now by the Judicature Act (1) transferred to this Court. I think Mr. Barlow is entitled to a charge upon the fund in the hands of the registrar of the Blackburn county court for his costs, and the Court is to make such order for the taxation and payment thereof as may seem to them to be just. If the matter solely affected the interests of the client, I should entertain no doubt that the solicitor would be entitled to costs as between solicitor and client. As John Catlow does not appear to be the person who has produced the mischief, but the defendants in the action of detinue, the costs should in justice be imposed upon their shares of the property; but it does not appear to me that under this statute the Court has power to make such an order, the words of the Act do not alter the powers of the Court. All we can do, therefore, is, to make Mr. Barlow's costs a charge upon the fund generally. Whether or not the matter can be equitably adjusted in the administration suit is not for us to consider; all we can do is to make the costs taxed as between solicitor and client a charge upon the fund in favour of Mr. Barlow.

LINDLEY, J. I am of the same opinion. Two questions arise in this case,—1, as to the power of the Court to make the order prayed,—2, as to the propriety of making it. I am of opinion that the case is clearly within the meaning of the Act. The property has been recovered or preserved through the instrumentality of the applicant. It is in the hands of the person who obtained the judgment: it is in the place where it ought to have been if the execution in the detinue action had been fruitful. It follows, therefore, that we have full power to make the order. Then, as to the propriety of making the order. Apart from the statute, the plaintiff as administrator is primâ facie entitled, as against the next of kin, to the possession of the property of the intestate. Having successfully instituted an action for the recovery of the property, his right could not be disputed. The right of the solicitor under the statute is not

(1) 36 & 37 Vict. c. 66, s. 34.

1877

CATLOW v. CATLOW.

more extensive than that. We shall be doing no wrong to the defendants by giving effect to his charge. Then, as to the plaintiff in the action,—if it had been competent to us to settle the account between the parties, I should have been disposed to hold that he was entitled to throw upon the defendants the costs which they caused by their improper defence of the action. That, however, it is not competent to us to deal with. All we can do is to declare Mr. Barlow entitled to a charge or lien on the assets in the hands of the registrar of the county court for his costs incurred in the action, such costs to be taxed as between solicitor and client, and to be paid out of the fund in the hands of the registrar in a due course of administration, with costs of the rule as against the defendants in the action.

*Order absolute.* (1)

Solicitors for John Catlow: *Milne, Riddle, & Mellor, for W. H. Holland, Accrington.*

Solicitors for defendants: *Johnson & Weatherall, for C. Hall & Son, Accrington.*

Solicitors for Barlow: *Shaw & Tremellin, for G. W. Barlow, Accrington.*

(1) The order was drawn up as follows:—"That the property the subject of the action *Catlow, Administrator* v. *Catlow*, be charged with the costs, charges, and expenses of G. W. Barlow, the then attorney of the plaintiff, amounting to the sum of 91*l.* 10*s.* 2*d.* (subject to taxation as between solicitor and client), upon the property the subject of the action, or the proceeds thereof, to be paid out of the assets in the administration suit in a due course of administration, and that the defendants in the action of *Catlow, Administrator*, v. *Catlow* do pay to the said G. W. Barlow or his agents the costs of this application, to be taxed."

[IN THE COURT OF APPEAL.]

1877
*April* 28.

PEARSON *v.* COX AND OTHERS.

*Negligence—Sub-Contractor—Evidence—Question for Jury.*

8 App Ca 444

The defendants were builders and contractors who after the outside of a house was finished had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public:—

*Held*, that the defendants were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of the defendants to provide against it.

By Lord Coleridge, C.J., and Bramwell, L.J. (Brett, L.J., doubting), that if it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor and not of the defendants.

*Bridges* v. *North London Ry. Co.* (Law Rep. 7 H. L. 213) discussed.

ACTION for damages for an injury caused by the negligence of the defendants.

At the trial before Denman, J., at the Nottingham spring assizes, 1877, it appeared that the defendant Cox was proprietor of certain land and buildings in Market Street, Nottingham. In October, 1876, certain building works were being carried on on the land by the defendants Bradley & Barker, who were the contractors with the defendant Cox for the works. For a considerable time during the progress of the works they were fenced off from the public highway by an outer hoarding or scaffolding. After the outside work was finished, but before the window-sashes were put in, the hoarding was removed by the defendants Bradley & Barker, at the instance of the defendant Cox. The plastering of the interior was then proceeded with by J. Smith, a plasterer, under a sub-contract with Bradley & Barker. On the 13th of October a tool called a "straightedge" was standing against a plank near one of the windows, and one of Smith's workmen in walking along caused the plank to spring, and so threw down the straightedge, which fell out of the window and injured the plaintiff, who was passing along the public footpath.

1877.

PEARSON v. COX.

In answer to questions by the learned judge, the jury found, 1. That the defendants did not fail to keep up the hoarding so long as the public safety required its continuance. 2. That the injury to the plaintiff was not caused by such failure. 3. That it was caused by the negligence of the defendants Bradley & Barker in not providing some other protection for the public; and they assessed the damages at 200*l*.

Judgment having been entered for the defendants, the plaintiff moved before the Court of Appeal to set aside that judgment as far as Bradley & Barker were concerned, and to enter judgment for the plaintiff.

*Buszard, Q.C.*, and *Lumley*, for the plaintiff. It was admitted that the building was in the hands of these defendants, and the jury have found that they were negligent in not providing sufficient protection against accidents like that which occurred to the plaintiff. Whether they are the persons responsible for such an accident is a question, not of law, but of fact: *Sadler* v. *Henlock*. (1)

*Mellor, Q.C.*, and *Stanger*, for the defendants. The real dispute was whether the hoarding ought to have been removed, and it was not suggested that it was the duty of the builders to guard the windows.

[They were then stopped.]

LORD COLERIDGE, C.J. I am of opinion that this judgment ought to be affirmed. The building was, up to a certain time, protected by a hoarding, which was then removed, and the jury have found that further protection by the hoarding was unnecessary, therefore nothing turns on its removal. There remained, however, certain internal work to be done by the sub-contractor, and his man put a tool called a straightedge against some planks which were afterwards shaken, and this caused the straightedge to fall out of the window and hurt the plaintiff. The plaintiff has brought an action against the builders of the house, and not against the plasterer, whose servant was using the straightedge. In my opinion such an action cannot be maintained. The case against these defendants was put upon two grounds: first, that

(1) 4 E. & B. 570; 24 L. J. (Q.B.) 138.

the falling of the straightedge was a thing for which they were personally responsible; but it was virtually admitted that the accident did not happen by the negligence of any person for whom the defendants were responsible. Secondly, that there was a general duty imposed upon these defendants to guard against accidents; but that must mean accidents which could reasonably be foreseen, and there was no evidence that this was such an accident. No doubt the accident has happened, and may happen again, but the falling of a tool in this manner is not such a probable incident in the plastering of the interior of a house as that it could reasonably have been foreseen. If it was so, that would be a ground for holding some one liable; but if any one is liable for not providing some protection, it would be the sub-contractor. On neither ground do I think that any liability was cast upon these defendants, and I think that the judgment ought to stand.

BRAMWELL, L.J. I am of the same opinion, and for the same reasons. The only ground on which the action could be maintained against the defendants would be that the carrying on of the work in the course of which the accident happened was a nuisance to the highway, unless the passers by were guarded against the results. It may be that when a house is being built there is a probability that tools or other things will fall, and the jury might be justified, either upon the evidence of experts or from knowledge of common life, and without experts being called, in finding that some protection to the public must be afforded. The question should be left to the jury, and I do not stop to consider exactly what the protection ought to be, whether a hoarding must be erected, or whether it would be sufficient that some one should be placed there to warn persons off. I will assume that there ought to be a hoarding, and in most towns there is a statutory provision requiring a hoarding; then it would be right to put up a hoarding, as otherwise there would be a nuisance; *Barnes* v. *Ward* (1) and *Hardcastle* v. *South Yorkshire Ry. Co.* (2) are authorities for this, and the builder might well, under these circumstances, be bound to put up a hoarding. But it was said that there was no occasion for a hoarding after the outside of the house

(1) 9 C. B. 392; 19 L. J. (C.P.) 195. (2) 4 H. & N. 67; 28 L. J. (Ex.) 139.

1877

PEARSON v. COX.

had been finished, and the jury have found to that effect. Then, was there any other duty cast upon the defendants? First, is there any duty with respect to the plastering? Are we to hold, as a matter of law, that plastering rooms involves such presumable danger to the passers by that unless some protection is afforded it is a nuisance to the public highway, or are we to leave that question to the jury? I could not hold it to be so as a matter of law, and if the question ought to have been left to the jury, at all events there ought to have been evidence of experts that such plastering was dangerous to the passers by. But be that as it may, I doubt if any such question ought to have been left to the jury. The jury, however, have found something to that effect. They appear to say that owing to the defendants not having provided against the accident, the accident happened. Therefore the jury thought that it ought to have been provided against, though I have great doubt whether there was any evidence on that point, and whether the judge ought to have left it to the jury.

But however that may be, if there was any such duty, it was the duty of the person whose conduct was a nuisance to the highway. I agree that the general builder would be the person who is to guard against general dangers in the course of the building, but this, according to the opinion of the jury, is not such an accident. But even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable. The plasterer, if any person, ought to be made liable; it is he who knows when he is going to begin, and when he is going to leave off, and how the work will be done; and he is the person who ought to provide against the accident. Going, therefore, as far as I can, and assuming that some one ought to have provided against the danger, the last link in the chain fails: it is the plasterer who ought to have provided against it, and not these defendants.

BRETT, L.J. I am of opinion that the judgment is right, because the jury found that there was no negligence in not keeping up the hoarding, and there was no evidence of any other negligence to be left to the jury. If it could be shewn that the tool was dropped through the negligence of the workman, I

think that the person liable would be the master of that workman, that is to say, the plasterer or sub-contractor, and that for such negligence these defendants would not be liable. If these defendants were liable, it would be for some other sort of negligence, and not for merely allowing a tool to fall. The negligence alleged was that the hoarding ought to have been kept up or that there ought to have been some protection at the window, but there was no evidence that the tool fell by the negligence of any one—no such question was left to the jury. It seems to have been assumed that the falling of this tool was the result of accident. If there had been any evidence that such an accident might probably happen whilst such work was going on in the interior of a house, then there might have been a question for the jury whether some one ought not to have guarded the public against such an accident. If there had been such evidence, then, with all deference to what has been said, I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public, as they had control over the whole building. But there was no evidence that any such accident was probable, and no one said it was probable that such things would fall from the window; nor is it a thing the probability of which must be known to all the world, so that the jury must be taken to know it without any evidence. The accident was highly improbable, and a man need not guard against highly improbable accidents.

With respect to the opinion I expressed in *Bridges* v. *North London Ry. Co.* (1), having again considered what I then said, I see nothing wrong in it, and I continue to hold the same opinion. But I did not say that there is not always a preliminary question for the judge to decide, namely, whether there is any evidence to go the jury. On the contrary, I asserted it, and in my answer to the House of Lords I laid it down that there is a question for the judge to decide. I said (2): "Such is the direction to the jury, but before giving this direction it is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish." Nothing can be more distinct than that, as shewing that

(1) Law Rep. 7 H. L. 213. (2) Law Rep. 7 H. L. at p. 232.

1877

PEARSON v. COX.

there is still a question of law whether there is any evidence, and I endeavoured to lay down what was the rule to guide the judge. He must ask himself whether the facts in evidence, if unanswered, would justify a man of ordinary reason and fairness in answering the question in the affirmative. I saw the difficulty, and I went on to say (1), "It may be said that this is so indefinite as to amount to no rule." I answered this by saying that I could not think so, and speaking of the verdict I said that though it might often happen that the verdict was not one which the judges would have given, yet they might not be able to say that reasonable and fair men might not have come to that conclusion, and therefore they would not be justified in setting it aside; and I thought that this rule would govern the judge in determining the preliminary question. It seems to me that there is always a question whether there is evidence or not; and in this case, if there had been some evidence upon which reasonable and fair men might find that the accident was one which might probably happen, the judge might have left it to the jury. But when there is no evidence that the accident is one which would probably happen, then if the jury were to find that any one was bound to guard against a wholly improbable accident, that is not a conclusion which reasonable men would come to. There was no such evidence, and I hold that these defendants are entitled to judgment.

*Judgment for the defendants.*

Solicitors for plaintiff: *Johnson & Weatherall, for Burton & Co., Nottingham.*

Solicitors for defendants: *Taylor, Hoare, & Co., for Hunt & Williams, Nottingham.*

(1) Law Rep. 7 H. L. at p. 233.

## ALLKINS AND OTHERS *v.* JUPE.

1877
*April* 19.

*Marine Insurance — Profit — Commission — Illegal Policy — "Ship and/or Ships, Steamer and/or Steamers" — "Without Benefit of Salvage, but to pay Loss on such Part as shall not arrive" — 19 Geo. 2, c. 37. s. 1.*

A policy containing any of the words forbidden by 19 Geo. 2, c. 37, s. 1, is illegal, if the insurance relates simply to "ship and/or ships, steamer and/or steamers," and does not exclude British vessels.

The plaintiffs effected a policy upon commission and profit upon "ship and/or ships, steamer and/or steamers;" and the following clause was inserted: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The defendant was an underwriter of the policy. The goods to which the commission and profit insured related were shipped on board a British vessel, which was lost by the perils of the seas. The plaintiffs having sued to recover the amount of the defendant's subscription, or, if the policy were void, the premium paid by them:—

*Held*, that the policy was rendered illegal by 19 Geo. 2, c. 37, s. 1, for the insurance was "without benefit of salvage," and the terms of the policy did not exclude British ships.

Per Grove, J., that the prohibition of the statute extends to policies on profit and commission:—

Per Lindley, J., that the prohibition of the statute extends to policies on profit, and that the policy sued on, being illegal as to profit, was likewise illegal as to commission:—

*Semble*, per Lindley, J., that the prohibition of the statute extends to policies on commission:—

*Held*, further, that the illegality was so far the fault of the plaintiffs that they could not recover back the premium.

SPECIAL CASE stated in an action on two policies of marine insurance. The following are the material facts:—

The plaintiffs were brokers and commission agents carrying on business in London. Their business consisted principally in buying and selling shellac of various qualities and descriptions for account of their principals. Such shellac was largely bought and sold under contracts, the terms of which were expressed in printed forms of bought and sold notes used by the plaintiffs. These notes, after describing the shellac, proceeded as follows: "To be shipped . . . by sailing vessel or steamers; should the vessel or vessels applying to this contract be lost before or after declaration, this contract to be cancelled so far as regards such vessel or vessels on production of the bill or bills of lading as soon as practicable after

1877

ALLKINS v. JUPE.

the loss is ascertained; ship or ship's name to be declared as soon as known to sellers; should the shellac or any portion thereof be transferred to any other vessel or vessels and arrive, this contract to hold good." When making such contracts the plaintiffs did not disclose the names of their principals on either side, and they were by the custom of the trade entitled to sue and liable to be sued as principals on such contracts. A brokerage of one and a half per cent. on the price was payable to the brokers according to the custom, of which one per cent. was paid to them by the seller and one half per cent. by the buyer. The brokerage was payable upon the completion of the transaction, and was not payable in case the contract was cancelled in pursuance of the provision contained in the contract. The plaintiffs used to receive instructions from many of the persons buying through them to effect insurances for the benefit of such buyers on the profits expected on the shellac bought under such contracts, and prior to the making of the policies herein mentioned the plaintiffs had had such instructions from various persons. They had been in the habit also of insuring their own commission as brokers on the contracts effected through them. On or about the 12th of January, 1874, the plaintiffs procured a policy to the amount of 1000*l.* The policy, which was in the ordinary form, was effected by the plaintiffs in their own name, on a voyage from Calcutta to London viâ the Cape or Suez Canal, "on ship $\frac{\text{and}}{\text{or}}$ ships, steamer $\frac{\text{and}}{\text{or}}$ steamers," at the rate of 1*l.* 10*s.* per cent., "to return 9*s.* 6*d.* per cent. for interest by steamers on this policy:" the insurance was declared to be "on commission $\frac{\text{and}}{\text{or}}$ profit," and the policy contained the following clause: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The policy was underwritten by the defendant for the sum of 100*l.* On the 6th of March, 1874, the plaintiffs effected another policy for the sum of 1000*l.*; it was similar to that of the 12th of January, except that it did not contain the words "to return 9*s.* 6*d.* per cent. for interest by steamers on this policy." This policy was also underwritten by the defendant for the sum of 100*l.* The words "without benefit of salvage" were inserted in the policies by the insurance brokers without any instructions from the plain-

tiffs; a clause of this kind was a stereotyped form usually inserted by insurance brokers in policies on commission and profits. The premiums were duly paid by the plaintiffs. In the month of January, 1874, the plaintiffs, acting as brokers, sold and resold certain cases of shellac: and on the 2nd of February the vendors declared that the shellac would arrive by the *Woosung*. On the 12th of February the plaintiffs declared an interest on the policy of the 12th of January, 1874, to the extent of 120*l*. on the *Woosung*. This declaration of interest was intended to cover the profits and commissions on the sale and re-sale of the shellac above mentioned. The *Woosung* was a British vessel, and sailed on the voyage insured with the shellac on board; she was wrecked in the Red Sea on the 20th of February, 1874, and became an actual total loss. A portion of her cargo was saved: some of the shellac shipped in her reached London in a greatly damaged state; it did not come in cases but in bags of lumps, and was a mass of matter mixed up with indigo, linseed, rape-seed, and jute. It was incapable of identification, and was brought to London in eight vessels. The total quantity of shellac on board the *Woosung* at the time she was lost was 750 cases; of this only one-tenth arrived, and in the condition above mentioned. The shellac that did arrive was subject to a heavy claim for salvage; none of it was tendered to the plaintiffs: on the contrary, the vendors gave notice that the contracts were void by reason of the loss of the *Woosung*. It was afterwards sold for the benefit of Lloyd's Salvage Association, and the proceeds were distributed amongst the underwriters on the cargo of the *Woosung*. The plaintiffs also sold and resold other cases of shellac, and the vendors declared they would arrive by the *Queen Elizabeth;* the plaintiffs declared on the policy of the 6th of March interest in the *Queen Elizabeth* to the extent of 300*l*. The declaration was intended to cover profits and commissions upon some of the shellac shipped on board the *Queen Elizabeth*. She was a British vessel, and sailed on the voyage insured, but was lost by the perils of the seas, being wrecked on the Tariffa Rocks. The cargo was submerged, and got out by divers; it was then taken to Gibraltar, and there shipped on board various vessels and brought to London. On the arrival of the shellac none of it was tendered to the plaintiffs by the vendors; they gave notice to

1877

ALLKINS v. JUPE.

the plaintiffs that the contracts were void owing to the loss of the *Queen Elizabeth*. All the above cases of shellac that were delivered in London arrived in a very damaged state; it was mixed up with indigo and saturated with sea-water.

The questions for the opinion of the Court (which was to have power to draw inferences of fact) were, first, whether the policies dated the 12th of January and the 6th of March were null and void by reason of the statute 19 Geo. 2, c. 37, or whether they were good either as regards the commissions or the profits, or both; secondly, whether, if the policies were null and void, the plaintiffs were entitled to recover the premium paid, or any part thereof. (1)

April 16, 19. *Benjamin, Q.C.*, (*Channell* with him), for the plaintiffs. As the policies sued on contain the words "without benefit of salvage," it is necessary to determine whether they are rendered illegal by 19 Geo. 2, c. 37, s. 1. (2) It has been held

(1) Other questions were stated for the opinion of the Court, but as the judgment proceeded entirely on the ground of illegality, it is unnecessary to mention them.

(2) 19 Geo. 2, c. 37, is intituled "An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon."

The preamble recites that "it hath been found by experience that the making assurances interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed and the parties concerned secured from loss, as well to the diminution of the public revenue as to the great detriment of fair traders, and by introducing a mischievous kind of gaming or wagering under the pretence of assuring the risk on shipping, and fair trade, the institution and laudable design of making assurances hath been perverted, and that which was intended for the encouragement of trade and navigation has in many instances become hurtful of and destructive to the same."

By s. 1. "No assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandizes, or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and every such assurance shall be null and void to all intents and purposes."

in *Smith* v. *Reynolds* (1) and *De Mattos* v. *North* (2) that this statute does extend to policies upon profits, although they are not expressly included in it; but *Thellusson* v. *Fletcher* (3), which was approved of in *Andree* v. *Fletcher* (4), decided that foreign ships are not within the prohibition of the 1st section of 19 Geo. 2, c. 37. In the present case the insurance is upon "ship $\frac{\text{and}}{\text{or}}$ ships, steamer $\frac{\text{and}}{\text{or}}$ steamers," and therefore its terms might have been complied with by shipping all the shellac on board foreign vessels; in that event the statute would not have been contravened; and the mere possibility, or even probability, of the goods being shipped in British vessels was insufficient to make the contract void at the time when it was entered into; and if it was valid in its inception, it could not be rendered illegal by something which afterwards happened.

The statute 19 Geo. 2, c. 37, did not intend to render illegal in every instance policies containing the words forbidden by the 1st section. A policy is avoided only when those words have some operation; in the present case it is clear that the underwriters were to get what is equivalent to the benefit of salvage, for it is provided that they were "to pay loss on such part as shall not arrive;" and it follows from this that they were not to pay in respect of the profit upon such goods, as should arrive: therefore the underwriters would obtain the benefit of any profit arising from the sale of goods, which after a total loss might be salved and arrive at the port of destination. Consequently, the words "without benefit of salvage" are insensible and unmeaning, and may be rejected as surplusage. But, further, it can be asserted that in the true sense of the term profits do not admit of salvage, for if the goods are lost or injured they cannot be sold at a profit; the statute only prohibits the use of the words mentioned in the 1st section in a policy upon things which are capable of salvage: *Lucena* v. *Craufurd.* (5) As this case was not alluded to in either *Smith* v. *Reynolds* (6) or *De Mattos* v. *North* (2),

(1) 1 H. & N. 221; 25 L. J. (Ex.) 337.
(2) Law Rep. 3 Ex. 185.
(3) 1 Doug. 315.
(4) 2 T. R. 161, at p. 164.
(5) 2 B. & P. (N.R.) 269, at p. 311.
(6) 1 H. & N. 221; 25 L. J. (Ex.) 337.

1877

ALLKINS v. JUPE.

these decisions do not carry the weight which they otherwise might deserve; for if *Lucena* v. *Craufurd* (1) had been brought before the attention of the Court of Exchequer, the result might have been different. It is true that during the argument in *Mortimer* v. *Broadwood* (2) reference was made to *Lucena* v. *Craufurd* (1), but the Court of Common Pleas felt itself bound by the authority of *Smith* v. *Reynolds* (3) and *De Mattos* v. *North.* (4) Nothing passes by the abandonment of profits: 2 Parsons on Marine Insurance, ch. 4, s. 5, p. 170; and on this ground it has been laid down that no notice of abandonment is required in a policy upon profits: 2 Phillips on Insurance, 5th ed., ch. 17, s. 1, p. 235, par. 1503; for it is a rule of law as to marine insurance, that where there can be nothing to abandon no notice of abandonment is necessary: *Rankin* v. *Potter.* (5) It follows that there can be no salvage of profits. An insurance upon commissions must be governed by the same rules and principles as an insurance upon profits, and if the policies sued on are valid as to profits, they are likewise valid as to commissions; there can be no abandonment to the underwriters of a policy upon commissions, at least as to those commissions which have not been earned: 2 Phillips on Insurance, 5th ed. ch. 17, s. 1, p. 236, par. 1504; and therefore there can be no salvage of them.

But, at all events, the plaintiffs are entitled to recover back the premiums, for the shellac might have been shipped on board foreign vessels. No doubt where a policy is illegal in its inception the whole transaction is void and the premium cannot be recovered back: *Andree* v. *Fletcher* (6); but in the present case, if the adventure is illegal, it is rendered so by collateral matter happening after the insurance was effected.

*Cohen, Q.C.* (*G. Bruce* with him), for the defendant. The insurance is rendered void by virtue of 19 Geo. 2, c. 37, for the policy includes British as well as foreign ships. The history of wagering policies is given in 1 Arnould on Marine Insurance, 4th ed., part 1 ch. 3, p. 111; and the result may be taken to be, that by enacting

(1) 2 B. & P. (N.R.) 269, at p. 311.
(2) 20 L. T. (N.S.) 398; 17 W. R. 653.
(3) 1 H. & N. 221; 25 L. J. (Ex.) 337.
(4) Law Rep. 3 Ex. 185.
(5) Law Rep. 6 H. L. 83.
(6) 3 T. R. 266.

the foregoing statute the legislature has declared that no insurance shall be valid which confers upon the assured a right to more than an indemnity. The prohibition of the statute cannot be avoided even by inserting a provision which in effect gives the assurer benefit of salvage. The plaintiffs' counsel have relied upon the words "to pay loss on such part as shall not arrive," and have contended that, owing to the use of them, the underwriters do get the benefit of salvage; but these words really impose an additional burthen upon the underwriters, for if they were not inserted the underwriters would only have to pay in the event of a total loss, the policy being warranted free from average: *Ralli* v. *Janson* (1); but these words make them liable for a partial loss. It has been clearly established that 19 Geo. 2, c. 37, extends to profits: *Smith* v. *Reynolds* (2); *De Mattos* v. *North* (3); *Mortimer* v. *Broadwood* (4); and these decisions must be accepted as binding until they are overruled in a court of appeal. Then there may be a salvage of profits. Suppose a ship sinks in shallow water and her cargo is afterwards recovered in an uninjured condition; or that she is derelict and is afterwards rescued and brought to her port of destination; or that she is captured by an enemy and is afterwards recaptured; in each of these cases, after payment by the underwriters, if the goods arrive and are sold at a profit, there will be salvage of profits. Again, suppose that a vessel is disabled by a storm and driven into a port of refuge, and that her cargo is found to be so much injured by water that it cannot be transhipped and forwarded to the port of destination except at a loss: here there is primâ facie a total loss of profit, and the underwriter is liable to pay; but suppose that afterwards the cargo, in its damaged condition, is sold at the port of refuge at a great profit upon its original cost, owing to a sudden demand for the goods of which it is composed: here, again, there will be a salvage of profits. But upon a policy in the form of those sued on, the underwriters will be deprived of the benefit of it. This shews that the policy is rendered void by 19 Geo. 2, c. 37. For similar reasons the policies are void as regards commission.

(1) 6 E. & B. 422; 25 L. J. (Q.B.) 300.

(2) 1 H. & N. 221; 25 L. J. (Ex.) 337.

(3) Law Rep. 3 Ex. 185.

(4) 20 L. T. (N.S.) 398; 17 W. R. 653.

1877

ALLKINS v. JUPE.

Then the premium cannot be recovered back, for it was paid in respect of an illegal insurance, and the risk had ended before this action was brought: 2 Arnould on Marine Insurance, 4th ed. part 3, ch. 9, p. 991. The plaintiffs are in a dilemma; for either the contract was in its inception illegal, or if it was originally lawful it has been rendered illegal by the act of the plaintiffs in causing the goods to be shipped on board British vessels; in neither case can they succeed. (1)

*Channell,* in reply. The effect of the words "warranted free from average . . . . but to pay loss on such part as shall not arrive," is to make underwriters liable for such cases of shellac as shall never arrive at all, but not for those which arrive in a damaged condition; the underwriters therefore in effect have the benefit of salvage. The words of the policy are to be construed according to their actual meaning as used therein; and when it is clear, from other parts, that a clause is not used in its ordinary sense, it ought to be struck out and rejected as surplusage; therefore the expression "without benefit of salvage" may be left out of consideration.

GROVE, J. We are of opinion that the defendant is entitled to the judgment of the Court; and we think it better to deliver our opinions at once, our minds being fully made up as to the question of illegality.

It is sufficient to refer to the policy dated the 12th of January, 1874, the other policy sued on being substantially the same, and

(1) *Cohen, Q.C.*, also contended that the plaintiffs could recover only in respect of those goods which had not arrived in any shape and could not recover in respect of those which had arrived in a damaged condition, although they might be incapable of identification, citing *Spence* v. *Union Marine Insurance Co.* (Law Rep. 3 C. P. 427); that the plaintiffs could recover only for profits and commissions upon goods which had been sold pursuant to a binding contract, citing *Stockdale* v. *Dunlop* (6 M. & W. 224); *McSwiney* v. *Royal Exchange Assurance* (14 Q. B. 634; 18 L. J. (Q.B.) 193; in Ex. Ch. 14 Q. B. 646; 19 L. J. Q.B. 222): that the plaintiffs could not recover owing to the form of the policies sued on as applied to the subject-matter of insurance, citing *Bell* v. *Ansley* (16 East, 141); *Watson* v. *Swann* (11 C. B. (N.S.) 756; 31 L. J. (C.P.) 210); *Ebsworth* v. *Alliance Marine Insurance Co.* (Law Rep. 8 C. P. 596.) But as the judgment of the Court proceeded entirely upon the ground that the policies were rendered illegal by 19 Geo. 2, c. 37, s. 1, these parts of the argument are omitted.

it is only necessary to observe that the insurance is upon "commission $\frac{\text{and}}{\text{or}}$ profit" upon goods to be put on board any ship or steamer, whether British or foreign, and, I may add, under the care of any master: and the following clause is inserted: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." These are the material parts of the policy, and before commenting upon them I will refer to the provisions of the statute relied upon by the defendant. It is 19 Geo. 2, c. 37, and from the terms of the title it appears to have been the intention of the legislature to regulate insurances upon British ships and their cargoes: the title of a statute is perhaps not to be deemed part of it, but it may sometimes be useful as a guide to its meaning. The preamble recites the different kinds of mischief which it was intended to check; but I need not read it, for its terms are well known to those who are familiar with the law of marine insurance. Then the 1st section provides that no insurance shall be made "on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandizes, or effects laden or to be laden on board of any such ship or ships .... without benefit of salvage to the assurer." The policy before us contains the words "without benefit of salvage," and omits the words "to the assurer;" but I think that the meaning is clear when we look at the next clause "to pay loss upon such part as shall not arrive:" the persons to pay are not expressly mentioned, but obviously they are the underwriters; and therefore, according to the ordinary rules of grammatical construction, it is the insurers who are not to have benefit of salvage, and the words read in full would run thus: "without benefit of salvage to the insurers, but they are to pay loss on such part as shall not arrive."

It has been urged on behalf of the plaintiffs that, as the statute which I have mentioned applies only to British ships, the policy sued on is not within its prohibition, for the commission and profits intended to be thereby insured might relate to goods shipped on board foreign vessels only. But I cannot assent to this argument; the policy contemplates a shipment upon either British or foreign vessels, and to my mind it is clear that it was intended by the parties to the insurance to bring to England the goods to which it related by vessels of any nationality. I think that the emphatic

1877

ALLKINS v. JUPE.

words of the statute are too strong to be got over, and that it was intended to render void any policy containing the forbidden words and relating to any probable or even possible loading of goods upon board a British vessel. In order that such a policy as this may escape the operation of the statute, cargoes on board British ships must be expressly excluded from the insurance. But even if I thought the form of the policy not to be illegal, I should agree with the argument advanced by the defendant's counsel that the insurance would become unlawful so soon as the goods were shipped on board a British vessel.

It is to be observed that 19 Geo. 2, c. 37, mentions ships and "goods, merchandizes, or effects," but does not allude in express terms to profits; but as to this I think we are bound by authority. The cases cited during the argument, *Smith* v. *Reynolds* (1), *De Mattos* v. *North* (2), and *Mortimer* v. *Broadwood* (3), decide that a policy upon profits "without benefit of salvage" is within the prohibition of the statute. The counsel for the plaintiffs referred to *Lucena* v. *Craufurd* (4), and relied upon the almost unanimous opinion of the judges delivered in the House of Lords as shewing that the statute intended to forbid the use of the words "without benefit of salvage" only when the insurance related to some matter capable of salvage (p. 311). And it was suggested that the decisions in *Smith* v. *Reynolds* (1) and *De Mattos* v. *North* (2) were hardly consistent with the reason of this opinion, and further, that as no allusion was made in either of them to *Lucena* v. *Craufurd* (4) they were of little authority, and would have been differently decided if the attention of the judges had been drawn to *Lucena* v. *Craufurd.* (4) I do not think that we can assent to this suggestion; unless there be some very strong reason to the contrary, we must accept as sound the decisions of courts of co-ordinate jurisdiction, especially when they have been pronounced some time ago, and ever since have, so far as we are aware, been acted upon and treated as binding authorities. And at all events the remark does not apply to *Mortimer* v. *Broadwood* (3), because there *Lucena* v. *Craufurd* (4) was brought under the notice of the Court.

(1) 1 H. & N. 221; 25 L. J. (Ex.) 337.

(2) Law Rep. 3 Ex. 185.

(3) 20 L. T. (N.S.) 398; 17 W. R. 653. WR(1869)1111

(4) 2 B. & P. (N.R.) 269.

It was also contended on behalf of the plaintiff that the words "without benefit of salvage" are so qualified by those which immediately follow, "but to pay loss on such part as shall not arrive," that they do not fall within the prohibition of the statute, and are in fact redundant and unmeaning. It was argued that upon the true construction of the language of the policy the assured would not receive more than an indemnity, and could not at once get salvage and payment from the underwriters. This appeared at first sight a captivating argument, and it was urged that the Court ought not to be astute to support a defence by which an underwriter upon technical grounds seeks to escape from a liability which he has undertaken to meet. As to this latter argument, I reply that we have nothing to do with questions of hardship: if the law is in fault it must be altered by the legislature, our only duty is to apply it to the facts before us. I will assume for the moment that the words in this policy "without benefit of salvage" are inoperative, and that in no instance could the plaintiffs obtain more than an indemnity; even in that case I think we could not have given judgment for the plaintiffs; whenever a statute is free from ambiguity, it is contrary to the duty of judges in effect to repeal it by exercising their own judgment as to whether a particular state of facts falls within the mischief aimed at by the legislature; when a statute is difficult to be interpreted, it may be proper, in order to ascertain its meaning, to consider what was the object of the legislature in passing it; or where an enactment construed in one sense, although that be the ordinary grammatical sense of the words, leads to a manifest absurdity, then the whole of the statute may be looked at, and courts of justice may interpret the apparently unmeaning enactment in such a manner as to render it consistent with what may be fairly presumed to have been the intention of the legislature. But the statute before us is plain and definite in its terms, and it is not for us to speculate whether the legislature might not have advantageously introduced an exception in favour of policies where from the nature of the subject-matter of insurance no salvage is possible. And further, the forbidden words may have been so injurious and mischievous in their operation that it was in the opinion of the legislature the safest course to prevent the use of them alto-

1877

ALLKINS v. JUPE.

gether; and it would be dangerous not to put in force the statute, because in a particular state of facts it might be difficult to see how the presumable intention of Parliament has been violated. There may be frauds and deceits in matters of insurance which my experience as a judge may not enable me to detect, and if we were to decline to act upon this statute because we may be unable to see what mischief contemplated by the legislature would result from holding this policy to be legal, we might afterwards find out that words such as these permit evils which are not for the moment present to our minds. Therefore, even if this policy did not seem to us capable of giving more than an indemnity to the assured, it would be dangerous for us to hold that the plaintiffs could recover.

But it is unnecessary to rest our judgment upon this ground, for in the present case the subject-matter of insurance may in some instances admit of salvage. I will first consider the policy as if it were simply upon goods. The material clause is, "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The argument before us has not made very clear what is the real meaning of the latter part of the clause, it being coupled with the words "warranted free from all average." As a general rule, when a marine policy contains a warranty against average, the underwriter is liable to pay only when there has been a total loss either actual or constructive, and if there be any salvage he takes the benefit of it in diminution of the amount claimed from him by the assured. But the policy before us contains the additional words "without benefit of salvage" to the insurer, as I read it; and if a total loss happens, and there is any salvage, the assured would get the full sum secured by the policy and also the salvage, and therefore would obtain more than an indemnity. Then follow the words "but to pay loss on such part as shall not arrive." In the first place, it is clear from these words that the underwriters must pay the sum assured upon those goods which never arrive at the port of destination; and I think it also clear that they are not bound to pay upon such part of the goods insured as may arrive in a saleable condition by the vessels upon board which they were shipped. But I will put another case: suppose that the goods

go to the bottom of the sea, and therefore are to all appearance irrevocably lost, and the underwriters pay the amount insured; and suppose that some time afterwards these goods are reclaimed by divers, or are left dry by a very low tide, or are cast ashore by a violent storm, and reach the hands of the assured, to whom they originally belonged. This is a case of salvage; but will the underwriters be entitled to recover back from the assured the money paid in respect of the goods which have arrived, whether such goods be damaged or undamaged? I think not, for the words "without benefit of salvage" seem effectually to prevent it. It is difficult to reconcile the words "warranted free from all average" with the words "to pay loss on such part as shall not arrive;" and the best interpretation which I can give the clause is to read the latter part as intended to make the underwriter liable in every case where the goods arrive under different circumstances from those under which they were expected, as for instance, if they arrive in a damaged condition in another ship and at a subsequent time; for in that case they do not "arrive" within the meaning of the policy. If this be the interpretation of the clause, the policy would clearly contravene the intention of the statute, for the assured might receive payment in full from the underwriters as for a total loss, and afterwards upon the arrival of the goods might derive a considerable sum from the sale of them; or he might sell the salvage at a foreign port, and so the goods might not arrive at all; he might therefore receive much more than an indemnity. It follows, therefore, that if this were a policy upon goods it would be rendered void within the reason of 19 Geo. 2, c. 37, for under some circumstances it would confer upon the assured more than complete compensation for his loss.

What I have hitherto said relates to a policy of goods. It has been contended by the plaintiffs' counsel that there can be no salvage of profits. This argument seems to be inconsistent with *Mortimer* v. *Broadwood* (1). There the policy was upon profits on a cargo of timber, and the Court of Common Pleas contemplated that there might be salvage. Literally there cannot be salvage of that which is incorporeal, but there may be benefit of salvage.

(1) 20 L. T. (N.S.) 398; 17 W. R. 653.

1877

ALLKINS v. JUPE.

viz., the benefit which would arise upon the goods arriving somewhere and being sold at an increase in price. The defendant's counsel has mentioned some instances in which there may be salvage of profits insured by a policy warranted free from average; the goods may be captured by an enemy and afterwards recaptured, or the ship carrying them may be abandoned, and afterwards her cargo may be brought safely to port. In each of these cases, if the goods be ultimately sold at a profit, there may be salvage of profits. And there may well be other cases. For these reasons, and upon the cases cited, I think that a policy upon profits "without benefit of salvage" is illegal within 19 Geo. 2, c. 37. All that I have said as to profit applies to commission, and therefore I hold that the policy is also illegal so far as it relates to commission.

Only one other question requires the expression of any opinion by us. As I construe the statute, the assurance is rendered illegal from the time when the contract is entered into, and not merely from the time when the risk insured against commences. It seems to me that an insurance contrary to the direction of the statute is so unlawful in all its incidents that the law will not countenance any part of it. Here the premium was paid for the purpose of effecting an illegal object, and therefore I think that no part of it can be recovered by the plaintiffs.

LINDLEY, J. I am of the same opinion.

I will in the first instance examine the contents of the policy dated the 12th of January, and my remarks as to it will equally apply to the policy dated the 6th of March.

It is an insurance relating to "ship $\frac{\text{and}}{\text{or}}$ ships, steamer $\frac{\text{and}}{\text{or}}$ steamers," and these words obviously include British ships; in fact, it may be described either as an insurance relating to British ships with the addition, if necessary, of foreign ships, or as an insurance, relating to foreign ships with the addition, if necessary, of British ships. Therefore I cannot assent to the objection raised by the plaintiffs' counsel that this policy does not necessarily include British ships.

The subject-matter of insurance is "commission $\frac{\text{and}}{\text{or}}$ profit." I

think that we must look at the policy as consisting of one insurance, and that we cannot split it up and treat it as containing separate insurances on "commission" and "profit." My impression is that even if we could split it up, all the reasons going to shew that a policy on profit may be rendered illegal by 19 Geo. 2, c. 37, equally extend to a policy on commission; but in my view the policy before us contains but one insurance, and if it is illegal as to profit, it is likewise illegal as to commission.

The important words are those contained in the clause, "warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The meaning of the warranty against average is quite clear; it provides that the underwriter is not to pay for an average loss, whether general or particular. The words "without benefit of salvage" are definite enough; they mean that if there be any salvage upon the occurrence of a loss within the terms of the policy, the underwriter is not to have the benefit of it. Then come the words "to pay loss upon such part as shall not arrive:" I think them intelligible enough, but I will presently make some further remarks upon them.

In effect we have been asked to strike out the words "without benefit of salvage" on the ground that they have no real meaning. It is difficult to see upon what principle we can do that. Primâ facie the contract contains words which, owing to a statute, render it illegal: if it could be proved that the words were inserted by mistake, it might be proper to rectify the contract by striking them out. But I am not satisfied that they were put in by inadvertence, and I think that some effect must be given to them.

If the insurance had been simply on profits "without benefit of salvage," the decisions in *Smith* v. *Reynolds* (1), *De Mattos* v. *North* (2), and *Mortimer* v. *Broadwood* (3), would of themselves compel us to hold the policy to be illegal; they are authorities directly in point, and establish two propositions: first, that 19 Geo. 2, c. 37, applies to a policy on profits; and secondly, that profits may admit of salvage.

(1) 1 H. & N. 221; 25 L. J. (Ex.) 337. (2) Law Rep. 3 Ex. 185.
(3) 20 L. T. (N.S.) 398; 17 W. R. 653.

1877

ALLKINS v. JUPE.

It has been contended that the present case does not fall within the authority of those cases owing to the insertion of the words, "but to pay loss upon such part as shall not arrive." It becomes necessary to state accurately the true meaning of this clause; and I will leave out of consideration for the moment the phrase "without benefit of salvage." I think that this clause read in connection with the warranty against average makes the underwriters liable to pay only in respect of profits on goods which do not arrive, either damaged or undamaged, before the time for payment after a loss has come. Then arises the question, What is that time, and how is it to be ascertained? No time is specified in the policy, and therefore I apprehend that in the event of a loss happening within the meaning of the policy, payment must be made at the time at which payments are ordinarily made in matters relating to marine insurance. When this customary time has expired, if the goods have arrived no payment is to be made by the underwriters; but if the goods have not then arrived the underwriters are to pay; that, I think, is the construction to be put upon the policy. Now, I will suppose a case where the goods have not arrived at the time for payment, and where after payment by the underwriters they do arrive, and are sold at an increase in price over their original cost. Can the underwriters recover any part of the money which they have paid? I know of no principle either at law or in equity which will enable them to do so. The money has not been paid under a mistaken supposition that the goods will not arrive; for it has been paid pursuant to the terms of the contract. Then the underwriters cannot take possession of the profit upon the sale of the goods and treat it as salvage; for the policy contains an express declaration that they shall not have "benefit of salvage." Therefore the assured may get more than an indemnity, and it follows that the policy is illegal within 19 Geo. 2, c. 37.

Then can the premium be recovered back? I think not. If the policy was illegal in its inception, then the whole transaction is void, and the law will not aid any of the parties; if it became illegal only when the goods were put on board British vessels, then the illegality is owing to the act of the plaintiffs, who cannot

1877

ALLKINS v. JUPE.

be heard to complain of the consequences of the act which they themselves have committed.

*Judgment for the defendant.*

Solicitor for plaintiffs: *John Rae.*

Solicitors for defendant: *Flux & Co.*

---

GAY, APPELLANT; CADBY, RESPONDENT.

*April* 23.

*Scavenger, Duties of—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120) *ss.* 125 *to* 129—*Refuse of Trade, &c.*

Ashes arising from coals burnt in the furnace of a steam-engine used for the purpose of sawing and lifting timber and other materials for carrying on the business of a pianoforte manufacturer, are "refuse of a trade, business, or manufacture," within the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 128.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

This was an application to the magistrate by the appellant and the respondent to determine whether certain ashes which the respondent had required the appellant, a scavenger under contract with the Fulham Board of Works, to remove, were or were not the refuse of the trade, manufacture, or business of the respondent (1) under the following circumstances:—

The appellant is the scavenger under the Metropolis Manage-

(1) The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), enacts,—

Sect. 125. It shall be lawful for every vestry and district board, and they are hereby required to appoint and employ a sufficient number of persons, or to contract with any company or persons for the sweeping and cleansing of the several streets within their parish and district, and for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth . . . . in or under houses and places within their parish or district, and such company and persons are hereinafter referred to as scavengers, &c.

Sect. 126. Any occupier of any house or land or other person who refuses or does not permit any soil, dirt, or ashes to be taken away by the scavengers appointed by or contracting with any vestry or board as aforesaid, or who obstructs the said scavengers in the performance of their duty, shall for every such offence forfeit and pay a sum not exceeding 5*l.*

Sect. 127. All dirt, dust, night-soil, ashes, and rubbish collected as aforesaid shall be the property of such vestry or board, and such vestry or board shall have full power to sell and dispose of the same for the purposes of this Act as they shall think proper.

Sect. 128. In case any scavenger be

1877

GAY v. CADBY.

ment Act, 1855, for the the parish of Hammersmith, which is within the district of the Fulham Board of Works.

The defendant is a pianoforte manufacturer occupying and using for the purpose of manufacturing and selling pianofortes an extensive building known as The West Kensington Steam Works, and which has only recently been erected, in the parish of Hammersmith.

There was on the respondent's premises a 25-horse power steam-engine, which steam-engine consumed a ton of coals per diem; the ashes arising from the coals burnt in the furnace of the steam-engine were the subject in dispute. Such ashes were kept in a separate ash-pit, and were in no way mixed with any other materials; and the ashes had never been removed during the respondent's occupation, he refusing to pay for such removal, and the appellant contending that by s. 128 he was entitled to be paid for such removal.

The steam-engine was used for the purposes of the respondent's business of a pianoforte manufacturer, but was used only as a force or power for sawing and lifting and for similar matters which before the use of steam-engines would have been done by manual or horse power.

The respondent contended that the ashes arising from the use of the steam-engine were not refuse of any trade, manufacture, or business within the meaning of ss. 128 and 129, and that, to be such refuse, they must be the refuse wholly or in part of things used in the manufacture or business, in the same way as building materials are in a builder's business.

The appellant contended that the words "refuse of any trade, manufacture, or business," in ss. 128 and 129, were meant to in-

---

required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum in case of dispute to be settled by two justices.

Sect. 129. If any dispute or difference of opinion arise between the owner or occupier of any such house or land and the scavengers required to remove such refuse, as to what shall be considered refuse, it shall be lawful for any two justices, upon application made to them by either of the parties in difference, to determine whether the subject-matter is or is not refuse of trade, manufacture, or business, or of any building materials, and in every such case the decision of such justices shall be final and conclusive.

clude all refuse arising from the carrying on any manufacture or business, and would include the ashes of coal burnt in the furnace of a steam-engine used solely for the purposes of the business.

It was admitted that the ashes of coal burnt in the ovens of bakers had always been removed by scavengers without payment.

The magistrate gave his determination in favour of the respondent.

The question was raised by the respondent, whether the magistrate had power to state a case, as the decision of the justices was (by s. 129) to be final and conclusive: but the point was not insisted upon, and the magistrate thought the section might be read as allowing no appeal on matters of fact, and, as the question as to the proper construction of "trade refuse" was one on which it was important that there should be a decision of a superior Court, and as the opinions of the metropolitan magistrates on the point had not been uniform, and the question was of considerable importance to the manufacturers and to the vestries and district boards of the metropolis, he stated a case.

The question for the opinion of the Court was, whether ashes produced in the manner stated in the case are or are not the refuse of a trade, manufacture, or business, within the meaning of the Act.

*Day*, Q.C. (*Rose* with him), for the appellant. The object of the Act was to have all refuse, ashes, and filth cleared away, whether in public or in private places. By ss. 125 and 126 the scavenger is bound to remove it and the occupier is bound to permit it to be removed. But by s. 128, if the scavenger is required to remove "the refuse of any trade, manufacture, or business, or of any building materials," the owner is to pay him a reasonable sum for so doing. These words are not found in the section (125) which imposes the obligation on the scavenger. The meaning of the Act is, that the scavenger is to carry away domestic refuse; but he is not to assist a tradesman in carrying on his business. If in the process of carrying on a trade or manufacture an excess of refuse

1877

GAY v. CADBY.

is created, that is to be removed at the expense of the manufacturer. Here, it is found that the ashes which the appellant was required to carry away at his own expense were refuse from a furnace attached to an engine used in and for the purpose of the respondent's business. If he had employed horse instead of steam power, he must unquestionably have removed the dung at his own expense. The plain meaning of the Act is, that the scavenger shall be paid for the removal not only of such matters as are rejected in the course of a manufacture, such as broken pottery or the like, but of ashes the refuse of the coal used to create the steam power by means of which the manufacture is carried on. The question can hardly be said to arise for the first time; for, in *Lyndon* v. *Standbridge* (1), under s. 87 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), which requires the commissioners under the special Act to cause "all the dust, ashes, and rubbish to be carried away from the houses and tenements of the inhabitants of the town or district within the limits of the special Act," it was held that those words did not extend to dust and ashes the exclusive produce of manufactories. Bramwell, B., there says (2): "If you look at the whole scope of the Act of Parliament, it is manifest to my mind that what was intended to be the rubbish was 'house rubbish,' or 'house dust,' or perhaps I should say 'occupation or inhabitancy dust and ashes,' or, as it has been called, 'domestic dust,'—things that arise from the occupation of houses."

*Herschell, Q.C.*, for the respondent. The ashes in question are not the refuse of a trade, manufacture, or business within s. 128 of 18 & 19 Vict. c. 120. They are the unconsumed portions of the coal used to heat the furnace and generate steam to be applied in aid of the manufacture, but not "refuse of the manufacture." Fire is kept for the purposes of almost every trade; for instance, in an hotel for the purpose of cooking the food of the guests, and in a furnace for heating an oven in which bread is baked: ashes produced by the latter, it is conceded, are to be removed without payment,—would those produced in the former be within the Act? To leave the strict definition of "refuse of a manufacture," is to embark in endless difficulty. *Lyndon* v. *Standbridge* (1)

(1) 2 H. & N. 45; 26 L. J. (Ex.) 386. (2) 26 L. J. (Ex.) at p. 392.

turned upon the language of an Act which differs essentially from that under consideration.

*Day, Q.C.*, in reply. The true distinction is between ashes and refuse which are produced in the occupation of premises for domestic purposes and ashes and other débris produced in the course of a manufacturing process. The legislature never could have contemplated that the manufacturer should be aided in his manufacture at the expense of the public.

GROVE, J. I am of opinion that the appellant is entitled to judgment. The case is undoubtedly primæ impressionis. There has been, we are told, a difference of opinion amongst the metropolitan police magistrates upon the subject; and the question we are asked is, whether ashes produced in the manner stated in the case are or are not in point of law refuse of a trade, manufacture, or business within the meaning of s. 128 of the Act? My notion of the object of the Act is that the ordinary refuse of towns and districts is to be removed by the contractors without expense to the persons whose refuse it is, but that persons who, in carrying on a trade, manufacture, or business for their own profit, create refuse independent and in excess of the ordinary domestic refuse, shall not impose upon the scavenger the burden of removing such refuse, but shall pay a reasonable sum for its removal. The word "refuse" in s. 128, I think, comprehends all ashes and other refuse created by the carrying on the trade or business, as distinguished from ordinary domestic or house refuse. The only question is whether that covers that which is not a residuum of the article produced in the manufacture, but the refuse of the material used in the course of the producing of the thing manufactured. I cannot see why "refuse" should be less applicable to the thing produced in the operation of the manufacture than to the residuum of the thing produced by the operation. Both should equally be removed at the expense of the manufacturer. Here, the coals are consumed for the generation of the power by means of which the manufacture is carried on; and the ashes or refuse from those coals are in my opinion refuse of the trade, manufacture, or business carried on by the respondent. I therefore think the payment was properly required by the con-

1877

GAY v. CADBY.

tractor, and that the respondent was bound to make it. Difficult questions of degree may be suggested: and the case finds that the refuse from bakers' furnaces is removed by the contractor without payment. It is enough to say that that question is not now before us, and that the ashes in question are clearly refuse which the contractor was not bound to remove without payment. The appellant must have judgment, with costs.

LINDLEY, J. I am of the same opinion, and substantially for the same reasons. It is obvious that if s. 125 had stood alone, the scavenger would have been bound to remove these ashes without payment. But then comes s. 128, which provides that, in case any scavenger be required to remove "the refuse of any trade, manufacture, or business, or of any building materials," the owner or occupier of the premises shall pay the scavenger a reasonable sum for such removal. Whatever be the true meaning of the word "refuse," it clearly means something beyond what is meant by the same word in s. 125. What is the scavenger to be entitled to extra remuneration for? Sect. 128 evidently contemplates some extra things in the nature of refuse or rubbish which the scavenger, though bound to remove, is not bound to remove without payment. The legislature has defined these things as "the refuse of trade, manufacture, or business." Building materials are put in for extra caution. Refuse of trade includes two classes, viz. residue of materials worked up in the trade or manufacture, and refuse of the material used in order to carry on the manufacture. The magistrate thought that the words in s. 128 were confined to the former description of refuse. I agree with my Brother Grove that that is too narrow a construction. Refuse of material used for the purpose of creating the power necessary for the making of the articles, is to my mind as much "refuse of trade," as the chips made by a carpenter in adapting timber to the erection of a building.

*Appeal allowed, with costs.*

Solicitors for appellant: *Watson, Sons, & Room.*

Solicitors for respondent: *W. H. Marshal, and Tanqueray, Willaume, & Co.*

HIGHAM, APPELLANT; WRIGHT AND ANOTHER, RESPONDENTS.

1877
*May* 11.

*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 52—*Workmen employed in Mine with power to dismiss themselves at a Moment's Notice—Termination of Service—"Employed in or about the Works."—Special Rules.*

By the Coal Mines Regulation Act, 1872, s. 52, power is given to frame special rules for the conduct and guidance of the persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in the H. mine no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In the H. mine the workmen had power to dismiss themselves at a moment's notice. The respondents were workmen employed in the H. mine, and being dissatisfied with their working-place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the respondents however ascended contrary to his direction:—

*Held*, that the respondents had been guilty of a breach of the special rule above-mentioned.

CASE stated by justices of the peace for Lancashire under 20 & 21 Vict. c. 43.

An information was preferred by the appellant against the respondents under s. 52 of 35 & 36 Vict. c. 76 (1), charging that the respondents being employed in a coal mine, known by the name of No. 2 Hewlett Pit, the same being a coal mine within the intent and meaning of 35 & 36 Vict. c. 76, and being then worked, unlawfully did violate one of the special rules duly established for and then in force in that mine by then and there going up the pit contrary to the direction of the hooker-on.

(1) By the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 52, "There shall be established in every mine to which this Act applies such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine, or employed in or about the same as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, and such special rules, when established, shall be signed by the inspector who is inspector of the district at the time such rules are established, and shall be observed in and about every such mine, in the same manner as if they were enacted in this Act.

"If any person who is bound to observe the special rules established for any mine acts in contravention of or fails to comply with any of such special rules, he shall be guilty of an offence against this Act."

1877

HIGHAM v. WRIGHT.

At the hearing of the information the following facts were proved:—The appellant was the hooker-on employed at the bottom of No. 2 Hewlett Pit, in Westhoughton, belonging to the Wigan Coal and Iron Company, and the respondents, at six o'clock in the morning of the 27th of February, 1877, were the servants of and employed by that company as coal miners, and did then descend the pit to go to their work. In accordance with s. 52 of the Coal Mines Regulation Act, 1872, there were established in this mine special rules for the conduct and guidance of the persons acting in the management of such mine, or employed in or about the same. By rule 25, "the word 'he' . . . shall mean a person employed in or about the works;" and by rule 42, "he shall not go down or up or into the pit contrary to the direction of the banksman or the hooker-on;" and it was for the violation of this latter rule that the respondents were brought before the justices.

At the bottom of the pit the following notice was hung up, and was there upon the day in question, and had been put up there by a person named W. James, who was the underlooker at the pit; but it bore no signature, and did not appear to be issued by any authority, except that it bore the words "By order."

"NOTICE.

"No workperson allowed to ascend the pit before two o'clock in the afternoon of the morning turn, and the afternoon turn not before ten o'clock, unless by accident or by permission from the underlooker or fireman. Neither must any workperson signal himself to ascend the pit without orders either by the underlooker or fireman. "By order.

"January 17, 1877."

This at most was a mere regulation by the company, or one of their servants, and not one of the special rules. At this pit the working hours for persons employed on what was called the first shift were from 6 A.M. to 2 P.M. The masters could terminate the contract with the workman at any time of the day at a moment's notice, either down the pit or above ground, and the workman could in like manner at any time terminate his contract with the employers. At eight o'clock in the morning of the day in ques-

tion the respondents being dissatisfied with their working-place, they alleging that it was a very wet place, and that they required to be paid for drawing water therefrom, went to the underlooker and the appellant and said that they did not intend to work there any longer, and that they would leave their employment; and the respondents asked the underlooker and the appellant at 9 A.M. to be then allowed to ascend the pit. The underlooker refused to allow them to ascend, and gave directions to the appellant not to allow them to ascend until 2 P.M. The respondents several times requested the appellant to be allowed to go up, but the appellant persistently refused. At 1 P.M. the respondents told the appellant they would go up; they got into the cage and gave the proper signals to the banksman at the top of the pit to wind them up. The cage ascended part of the way, and then the appellant signalled up the pit and the respondents were let down again; some altercation then took place between the respondents and the appellant, and the appellant was slightly assaulted by one of the respondents, and the respondents again got into the cage, gave the signals, and were drawn to the top.

It was contended on the part of the appellant, that upon these facts the respondents had brought themselves within the meaning of No. 42 of the special rules, and that they ought to be convicted. It was admitted on the part of the appellant, that if the respondents had been discharged from their employment by the underlooker at 9 A.M. he, the underlooker, would have allowed the respondents to go up the pit at that time.

It was contended on the part of the respondents that, inasmuch as they had a perfect right to put an end to their contract at any moment either above ground or below, and they had actually discharged themselves from the service of their employers at eight o'clock on the morning of the day in question, being no longer servants of the company they were no longer bound by the rules in force in the mine, and that such rules applied to workmen only whilst so employed in the mine; and that being so discharged they ought to have been allowed to ascend the pit when they asked the underlooker and hooker-on at 9 A.M., and that the appellant was guilty of imprisoning the respondents in the pit against their will for four hours, namely, from 9 A.M. to 1 P.M.;

1877

HIGHAM v. WRIGHT.

and during such time they did no work, and were not in the employment of the company.

A majority of the justices were of opinion that the respondents, having stated at 8 A.M. their intention of no longer working in the pit and of leaving the service of their employers at once, and having so determined their contract, ought to have been allowed to go up the pit at 9 A.M. when they asked permission so to do; and the majority of the justices were also of opinion that the respondents from the time of their putting an end to their contract ceased to be persons employed in the mine, and after having been refused permission to ascend the mine were no longer subject to the special rules then in force at the mine.

The information was therefore dismissed.

The question of law therefore was whether the majority of the justices were right in refusing to convict.

*F. Herschell, Q.C.* (*Fitz Adam* with him), for the appellant. The respondents, although they had discharged themselves, did not cease to be employed in the mine, whilst they were lawfully kept in it in accordance with the special rules framed under the Coal Mines Regulation Act, 1872. The construction adopted by the majority of the justices is too narrow.

The respondents did not appear.

GROVE, J. I should have been better satisfied if this case had been argued on behalf of the respondents, but I have come to the conclusion that the contention of the appellant's counsel is right, and that it puts the only reasonable and proper construction upon the special rules framed in accordance with s. 52 of the Coal Mines Regulation Act, 1872. Now this section provides as follows: [The learned judge read it.] The meaning of the enactment is plain: it authorizes the framing of rules for the safety and proper discipline of persons employed in a mine, and further it allows regard to be had to "the particular state and circumstances of such mine." I think that by a rule properly framed under this section a person not employed in a mine might be restrained from going out of it at a specified time, if a rule of this kind were fairly necessary for the discipline or safety of those employed in it; and in that event the difficulty arising

in the present case would not occur. But the information was laid under No. 42 of the special rules applying to No. 2 Hewlett Pit, by which it is provided that "He shall not go down or up, or into the pit, contrary to the direction of the banksman or the hooker-on;" and upon turning to No. 25, "he" is explained to mean "a person employed in or about the works." The respondents had the power of dismissing themselves and of giving up their employment at a moment's notice; and the argument which appears to have prevailed before the justices is that from the moment the respondents gave notice that they had quitted the employment, they ceased to be "employed in or about the works," and therefore they did not fall within the meaning of the word "he," as used in No. 42 of the special rules, and were not prohibited from ascending the pit without the consent of the hooker-on. Upon a very close scrutiny of the rules this may appear to be their literal interpretation; but s. 52 declares that special rules shall have the same force as if they were enacted in the Act, and it is a principle to be observed as to the interpretation of statutes, that where a strictly literal construction leads to a manifest absurdity, a construction may be adopted which will carry out what may be reasonably supposed to have been the intention of the legislature. Now I think that a strict construction of No. 42 of the special rules would defeat the objects of the legislature, as stated in s. 52, and might endanger the safety of persons employed in the mine, and might produce great difficulty in the proper working of it. If the contention for the respondents before the justices were correct, any person who had accepted employment with the power of giving it up at a moment's notice might quit the mine at any time, and by so doing might utterly derange its management, and might occasion great danger to the lives and limbs of the workmen employed therein. I think that when persons have gone down a pit for the purpose of being employed therein and have been so employed, they must by reasonable implication be taken to have accepted that employment subject to such regulations as are made for the benefit of the mine; therefore, if they put an end to the relation of master and servant, they can only do so upon such conditions as are necessary for the proper working of the mine; for instance, suppose it were expedient for the due ventila-

1877

HIGHAM v. WRIGHT.

tion of a mine that certain doors should be kept shut during specified hours; workmen who discharged themselves could not, in order to leave the mine, open these doors during the time when they ought to be shut. I think that the construction put by the majority of the justices upon the special rules leads to a manifest absurdity and cannot be upheld. Our judgment must be for the appellant.

LINDLEY, J. I am of the same opinion. It appears to me that the construction put by the majority of the justices upon the expression "a person employed in or about the works" is too narrow; the scope and object of the statute and of the special rules require a wider interpretation. Upon the morning of the day in question the respondents went down into the mine as persons employed therein, and remained down for some time, that is, until they discharged themselves. When did their character of persons employed in the mine cease? The majority of the justices have taken the view that at the moment when the respondents terminated their contract of service, they ceased to be "persons employed in or about the works," within the meaning of No. 25 of the special rules. I think that a mistake. No doubt the contract of service was at an end when the respondents gave notice to terminate it, and I am disposed to think that if a reasonable time had elapsed for going out of the mine, regard being had to its extent, and if permission to quit it had then been refused to the respondents, they would no longer be in the position of persons employed in the mine; but upon the facts stated in the case before us, I think that their character of persons employed in the mine continued when they quitted it contrary to the direction of the hooker-on, for a reasonable time had not then elapsed. In this point of view the notice at the bottom of the pit becomes very important, for it plainly indicates that the end of the morning shift was the proper time for the respondents to quit the pit. If they had been detained after that time, a very different question might have arisen; but until then they were subject to the operation of the special rules.

*Judgment for the appellant.*

Solicitors for appellant: *Sharpe, Parkers, & Co., for Peace & Bell, Wigan.*

## CREW *v.* TERRY AND OTHERS.

1877
*June* 25.

*Bankruptcy—Annulment of Adjudication—Resolution to accept Composition—Rights of unsatisfied Execution-Creditor after Adjudication is annulled—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 28, 81.

15 Ch D 346

T. recovered judgment against C. whose goods were seized by the sheriff under a writ of execution. C. thereupon filed a petition for liquidation, and an order was granted restraining the sheriff from selling. This order was afterwards discharged and C. was adjudged bankrupt, but a fresh restraining order was granted under the bankruptcy. The sheriff then withdrew voluntarily. Afterwards the creditors of C. resolved under the Bankruptcy Act, 1869, s. 28, to accept a composition of 5*s.* in the pound upon "the debts proved and admitted in the bankruptcy;" they further resolved that the order of adjudication should be annulled forthwith, and that the property of C. should be handed back to him. T. did not assent to the resolution. The Court of Bankruptcy affirmed the resolutions, and ordered the adjudication to be annulled. Afterwards under the same writ of execution, the sheriff again seized the goods of C. under the direction of T.:—

*Held*, that under the Bankruptcy Act, 1869, s. 81, the property in C.'s goods reverted to him upon the annulment of his bankruptcy, that the resolutions were not binding upon T. who had neither assented to the composition nor proved under the bankruptcy, and that the seizure by the sheriff of C.'s goods after the annulment of his bankruptcy was lawful.

*Quære*, whether the seizure after the annulment would have been lawful, if the composition had not been confined to "the debts proved and admitted in the bankruptcy" and had extended to any debts "provable under the bankruptcy."

DEMURRER to statement of claim.

The facts and arguments are sufficiently stated in the judgment.

June 14, 16. *Bush Cooper*, for the defendants, in support of the demurrer.

*Cooper Willis*, for the plaintiff, in support of the statement of claim.

In the course of the argument the following cases were cited: as to the effect of withdrawal by a sheriff after seizure: *Blades* v. *Arundale* (1); as to the rights of an execution-creditor where the execution-debtor presents a petition for liquidation, *Ex parte Rayner, In re Johnson* (2); and the following sections of the

(1) 1 M. & S. 711; per Lord Ellenborough, C.J.
(2) Law Rep. 7 Ch. 325.

1877

CREW v. TERRY.

Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), were referred to:—ss. 6 (sub-s. 5), 11, 12, 14, 15, 17, 25 (sub-s. 6). s. 87, s. 95 (sub-s. 3), 125 (sub-ss. 5, 7).

*Cur. adv. vult.* (1)

June 25. DENMAN, J., delivered judgment.

This was a demurrer to the whole of an amended statement of claim.

The statement of claim alleged in substance as follows:—On or about the 27th of July, 1876, the defendants Terry recovered judgment against the plaintiff in the Common Pleas Division for 86*l.* 0*s.* 4*d.* On that day a writ of execution was issued and lodged by the defendants Terry with the sheriff. On the 29th of July, the sheriff entered and took possession of the goods of the plaintiff, and remained in possession until the 14th of October, when he gave up possession. On the 9th of August, 1876, the plaintiff filed his petition for liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869, and on the 15th a receiver was appointed and an interim injunction was granted restraining the defendants and the sheriff from proceeding further under the execution until after the 22nd of August, 1876, and on that day the interim injunction was continued until further order. On the 24th of August, 1876, the first meeting of creditors was held and adjourned to the 31st. At the adjourned meeting no resolutions were carried, and a bankruptcy petition was presented, the act of bankruptcy being the filing of the petition. On the 2nd of October the restraining order was discharged, and immediately afterwards another order was made in the matter of the petition for adjudication, whereby the execution-creditors and the sheriff were restrained from selling until after the 12th of October, the day named for hearing. On the 12th of October an order of

(1) This action had been commenced in the Chancery Division but had been transferred to this Division pursuant to an order. The statement of claim, amongst other grounds of relief, claimed an injunction to restrain the defendants from proceeding with the execution, and Bush Cooper for the defendants, contended that this remedy was not open to the plaintiff, and that this Division could not be asked to restrain by injunction its own process, in the original action, *Terry* v. *Crew*; but owing to the ground upon which the judgment of Denman, J., proceeded it is unnecessary to further allude to this question.

adjudication in bankruptcy was made against the plaintiff. On the 14th the sheriff withdrew. Such withdrawal was voluntary on his part, and not upon any terms as to re-entry. On the 27th of October one Andrews was appointed trustee, and took possession of and dealt with the estate as such. Some time after the appointment of the trustee an offer was made by the plaintiff to annul the adjudication upon terms as to payment of a composition; and, on the 6th of December, 1876, at a meeting of the creditors resolutions were passed to the following effect:—To accept a composition of 5*s.* in the pound *upon the debts proved and admitted in the bankruptcy:* the order of adjudication to be annulled forthwith: the property of the bankrupt which is now in the hands of the trustee to be handed back to the bankrupt. On the 9th of January, 1877, the Court affirmed the resolutions, and ordered the same to be carried into effect; and on the 2nd of February, 1877, an order was made "that the adjudication made against the bankrupt be and the same is hereby annulled." On the 2nd of March last the sheriff, under the direction of the defendants Terry, again levied execution upon the plaintiff's effects at the suit of the defendants Terry. This execution was levied under the writ before referred to.

To this statement the defendants demurred, on the ground "that it admits that the seizure of the plaintiff's effects by the sheriff before the bankruptcy of the plaintiff, by virtue of the said judgment and writ of execution, was lawful, and does not shew that the goods were ever either in law or in fact released or discharged from the said judgment and writ of execution, or that the plaintiff before this action became entitled to the said goods discharged from the said judgment and writ, or that the seizure thereof under the said writ by the sheriff after the annulling of the bankruptcy was unlawful."

Though the case was very elaborately and ably argued, and many authorities cited, and sections of the Bankruptcy Act, 1869, referred to, it appears to me that the question whether this statement of claim shews any cause of action against the defendants Terry and the sheriff lies within a small compass, and depends almost entirely upon s. 81 of the Bankruptcy Act, 1869, and the meaning of that portion of the section which relates to the "revert-

1877

CREW v. TERRY.

ing" of a bankrupt's property upon the annulment of an adjudication. That section is as follows:—"Whenever any adjudication in bankruptcy is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged a bankrupt shall in such case vest in such person as the Court may appoint, or, in default of any such appointment, revert to the bankrupt for all his estate or interest therein, upon such terms and subject to such conditions, if any, as the Court may declare by order."

The plaintiff relies upon this section as giving him an absolute right to the goods free from any liability to the Terrys' execution. The defendants, on the other hand, contend that the words "revert to the bankrupt for all his estate or interest therein," in the absence of any special terms or conditions imposed by the Bankruptcy Court, replace them in the same position in which they stood on the 12th of October, the day of the order of adjudication, in other respects, but exempt from the restraining order, which expired on that day.

The annulment of the adjudication took place on the 2nd of February, 1877; and the Court of Bankruptcy then approved and confirmed the composition and scheme of settlement, one term of which was that the property of the bankrupt then in the hands of the trustee (including the property in question in the cause) should be "handed back" to the bankrupt on confirmation.

I think it clear that this was a proceeding which caused this property to revert to the bankrupt unconditionally, so far as any special terms or conditions which the Bankruptcy Court alone could have imposed were concerned: but the question is whether, under the words "for all his estate or interest therein" do not reserve to the execution-creditors, who had seized the goods before adjudication, their rights over the goods, and restore the status quo at the time of adjudication as regards both parties. The execution-creditors here were no parties to the composition, nor had any intermediate transaction taken place in which the trustee in bankruptcy had sold or disposed of the goods, within the earlier words of s. 81. I am of opinion that the defendants' contention is

correct, and that, as soon as the bankrupt took back his goods under the order of the Court of the 2nd of February, 1877, he took them again subject to the unexhausted right of the execution-creditors, and of the sheriff on their behalf, to re-take the goods and sell them for the purpose of levying the fruits of the judgment obtained against the plaintiff.

In the case of *Ex parte Sheriff of Middlesex, In re England* (1) it was held that the creditors of a bankrupt, who have accepted a composition, cannot thereby deprive an execution-creditor of his right; and the judge restrained an action against the sheriff at the suit of the execution-debtor. It appears to me impossible to contend that the case of a composition accepted with an adjudication annulled differs in any material respect from the case of an ordinary composition after a petition for liquidation. So far as the principle applicable to the two cases is concerned, both end in a purely voluntary arrangement between the debtor and those creditors who choose to be contented with a composition. The whole proceedings may be carried on entirely in the interest of the debtor. The remarks of Vice-Chancellor Bacon in the case of *In re England* (1) apply equally to both. "If," he says (2), "the contention which this debtor has raised were allowed to prevail, it would open the door to very flagrant injustice; for, as happens not unfrequently, the majority of a man's creditors may be so related to or connected with him that they would be willing to accept a very small or even a nominal composition, if by so doing they could wrest from an execution-creditor the fruits of his proceeding, in order to bestow them on a bankrupt." I can find nothing in the other provisions of the Act compelling me to put so narrow a construction upon the words "for all his estate or interest therein" as to induce me to hold that those words may not, amongst other objects, be intended for the very purpose of preserving to an execution-creditor the interest he possesses in the goods of his execution debtor, which at the time of the annulled adjudication were in the hands of the sheriff.

I do not find that any case has yet been decided where the exact question here raised has arisen; but there are authorities which bear upon the question, and, I think, support the above view.

(1) Law Rep. 12 Eq. 207. (2) At p. 213.

1877

CREW v. TERRY.

In *Bailey* v. *Johnson* (1), Cockburn, C.J., reads s. 81 as follows:— "The effect of s. 81 is, subject to any bonâ fide disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation. Here, the Court of Bankruptcy has imposed no condition: the general provision of the section has therefore its full effect, and that effect is to remit the bankrupt, at the moment the decree annulling his bankruptcy is pronounced, to his original powers and rights in respect of this property."

Though the question in *Bailey* v. *Johnson* (1) was of a different kind from that arising in this case, I think it is important to note that the language of Cockburn, C.J., even in a case where the Court were supporting the debtor's rights under s. 81, is language entirely consistent with the rights of others, independent of the bankruptcy proceedings, which existed at the time of the bankruptcy.

It has been laid down by the Court of Appeal in several cases that the rights of an execution-creditor ought to be respected, except so far as the Act of Parliament has expressly interfered with them: see *Ex parte James, in re Condon* (2), *Ex parte Villars* (3) (there cited), and *Ex parte Jones, In re Jones.* (4) The judgments in the case of *Slater* v. *Pinder* (5), twice argued in the Court of Exchequer, and affirmed on appeal (6), and *Ex parte Rocke, In re Hall* (7), though decided upon another section of the Act, are full of passages which tend to support the same view. And I think that, where an expression such as that in question here is used in a statute, being one equally capable of a narrower or a more liberal construction, the latter ought to be adopted in order to carry out a principle so constantly laid down and in itself so reasonable.

The case of *In re Chidley* (8), which was relied upon for the plaintiff, appears to me to be no authority in favour of his contention; for, that was a case in which the resolution upon annulment

(1) Law Rep. 7 Ex. 263, at p. 265.
(2) Law Rep. 9 Ch. 609, at p. 613.
(3) Law Rep. 9 Ch. 432.
(4) Law Rep. 10 Ch. 663.
(5) Law Rep. 6 Ex. 228.
(6) Law Rep. 7 Ex. 95.
(7) Law Rep. 6 Ch. 795.
(8) 1 Ch. D. 177.

was not to "hand back" the property to the bankrupt, but to vest it in a new trustee for the benefit of creditors, whose duty it was to see the terms of the composition carried out: whereas, in the present case, the property was to be at once handed back to the bankrupt immediately on the confirmation of the scheme, and the creditors who assented to the composition agreed that the adjudication should be annulled forthwith on the promissory notes for the composition and a certain sum for costs being paid into the hands of the new trustees under the composition.

It was contended for the plaintiff that s. 28 of the Act bound the execution-creditors to the composition. That section provides "that the approval of the Court shall be conclusive as to the validity of any such composition or scheme," and it shall be binding "on all the creditors, so far as relates to any debts due to them and provable under the bankruptcy."

It is not necessary to decide how far the execution-creditors here might have been bound if the composition and scheme had not been entirely confined to debts "proved and admitted in the bankruptcy." It was contended that these words were large enough to include all debts provable in bankruptcy, whether proved or not: but I do not think they can be so construed as against a non-assenting judgment-creditor; and, if this be so, the only effect of s. 28 is, to make it binding so far as relates to debts already proved and admitted, or at most to such as shall be proved and admitted during the bankruptcy, i.e. before the annulment, which was not the case with the defendants' execution-debt.

I am therefore of opinion that the plaintiff, who has only received back his goods by virtue of the annulment of his adjudication, stands precisely in the same position as regards his right to sue the defendants as he was in before the adjudication took place, but without the protection of any restraining order; and that, inasmuch as the defendants Terry had an unsatisfied judgment against him, and were no parties to the bankruptcy proceedings, and the writ was still in the hands of the sheriff, the plaintiff had no right to complain that the goods which reverted to him "for his estate and interest" only, were seized by the sheriff for the other defendants, for whom the sheriff was lawfully in possession when the restraining order was issued; and that, upon

1877

CREW v. TERRY.

the same principle upon which the Bankruptcy Court restrained the proceedings against the sheriff in *In re England* (1), this Court ought not now to permit an action to be brought or proceeding taken either against the Terrys or against the sheriff for pursuing the rights of the former, which were merely suspended during the restraining order and during the existence of the proceedings in bankruptcy, which came to an end by the order confirming the annulment, in February, 1877.

I therefore give judgment for the defendants.

*Judgment for the defendants.*

Solicitor for plaintiff: *W. A. Plunkett.*
Solicitors for defendants: *Cordwell & Scott.*

---

*June* 25.

HUCKLE *v.* WILSON AND OTHERS.

*Benefit Building Society—6 & 7 Wm. 4, c. 32, s. 4—10 Geo. 4, c. 56, s. 27—Action against Trustees by Retiring Member to recover Subscriptions—Reference to Arbitration or Justices—Exclusive Jurisdiction—Effect of Notice of Withdrawal.*

The defendants were trustees of a benefit building society, enrolled pursuant to 6 & 7 Wm. 4, c. 32 (2), and the statement of claim alleged that the plaintiff became a member of the society, and was the holder of first-class shares, and during his membership paid his subscriptions, that by a rule of the society any member holding first-class shares, desiring to withdraw from the society, should,

---

(1) Law Rep. 12 Eq. 207.

(2) 6 & 7 Wm. 4, c. 32, is intituled "An Act for the Regulation of Benefit Building Societies," and enacts by s. 4 that "all the provisions of a certain Act, made and passed in the tenth year of the reign of his late Majesty King George the Fourth, intituled "An Act to consolidate and amend the Laws relating to Friendly Societies" . . . . so far as the same, or any part thereof, may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof, shall extend and apply to such benefit building society and the rules thereof in such and the same manner as if the provisions of the said Act had been herein expressly re-enacted."

10 Geo. 4, c. 56, is intituled "An Act to consolidate and amend the Laws relating to Friendly Societies," and enacts, by s. 27, that "provision shall be made by one or more of the rules of every such society, to be confirmed as required by this Act, specifying whether a reference of every matter in dispute between any such society, or any person acting under

after giving three months' notice, receive back the whole amount paid by him for subscriptions; that the plaintiff gave the requisite notice of withdrawal, and there then became due to him from the society the sum of £35 8*s.* 6*d.*, which the plaintiff was entitled to be paid according to the rule:—

*Held*, upon demurrer, that the statement of claim was bad; for it alleged a dispute between a building society and a member thereof, and a rule must be assumed to exist referring disputes of that kind to arbitration or justices, pursuant to 10 Geo. 4, c. 56, s. 27 (incorporated by 6 & 7 Wm. 4, c. 32, s. 4), and the mere notice of withdrawal given and assented to would not prevent the application of the rule. (1)

THIS was a demurrer to a statement of claim. The plaintiff took out a summons to set aside the demurrer as frivolous and vexatious; but at the hearing by one of the masters the summons was dismissed with costs; the plaintiff appealed to Huddleston, B., who confirmed the decision of the master with costs; the plaintiff thereupon, by way of appeal to this division, gave notice of motion to set aside the demurrer on the ground above mentioned. The motion was ordered to be argued with the demurrer.

The other facts are sufficiently stated in the judgment of Denman, J.

June 14. *C. H. Anderson*, for the plaintiff, supported the statement of claim and the motion.

*Buck*, for the defendants, supported the demurrer and opposed the motion.

---

them, and any individual member thereof, or person claiming on account of any member, shall be made to such of his Majesty's justices of the peace as may act in and for the county in which such society may be formed, or to arbitrators to be appointed in manner hereinafter directed." The section then provides for the appointment of arbitrators.

(1) 10 Geo. 4, c. 56, was repealed by 18 & 19 Vict. c. 63, and 6 & 7 Wm. 4, c. 32, was repealed by the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 7, except as to societies then subsisting, which should not obtain a certificate of incorporation under that Act, as amended by the Building Societies Act, 1875 (38 & 39 Vict. c. 9); but similar provisions as to the determination of disputes between a building society and its members are contained in the Building Societies Act, 1874, for by s. 16 it is provided that "the rules of every society hereafter established under this Act shall set forth . . . . (subs. 9) whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the" county "court, or to the registrar, or to arbitration." See also ss. 34, 35, 36.

1877

HUCKLE v. WILSON.

The following cases were cited during the argument: *Morrison* v. *Glover* (1); *Sinden* v. *Banks* (2); *Prentice* v. *London*. (3)

*Cur. adv. vult.*

June 25. DENMAN, J., delivered judgment.

In this case two questions were raised,—first, whether the statement of claim was good upon demurrer,—secondly, whether the demurrer was frivolous and vexatious.

The first question involves a consideration of certain clauses of the Friendly Societies Acts, and of the real meaning of the statement of claim.

The defendants in the action were sued as trustees of a Benefit Building Society. The statement of claim, omitting immaterial parts, is as follows:—1. That the plaintiff, in 1864, *became a member* of the building society in question, being one duly inrolled pursuant to 6 & 7 Wm. 4, c. 32, and was the holder of divers first-class shares, and *during the time of his said membership* duly paid subscriptions, &c.; 2. That, by rule 13 of the said society, "any member holding first-class shares desiring to withdraw from the society shall after giving three months' notice in writing to the society receive back the whole amount paid by him for subscriptions, with the exception of fines incurred and 1*s.* 6*d.* per annum for working expenses;" 3. That, in 1871, the plaintiff gave notice of withdrawal under rule 13, and there then became due to the plaintiff from the society the sum of 35*l.* 17*s.* 6*d.*, less 9*s.* working expenses, being at the rate of 1*s.* 6*d.* per annum per share as provided for by that rule, "which the plaintiff is entitled to be paid according to the said rule:" and the plaintiff claimed 35*l.* 8*s.* 6*d.*

The objections taken upon the demurrer were, that the claim was bad in law, on the ground that it was a dispute between the board and a member of the society respecting the construction of its rules, and that therefore the action was not maintainable, but that the dispute must be determined by arbitration; also, that the claim did not aver that the defendants had in hand any funds

(1) 4 Ex. 430; 19 L. J. (Ex.) 20. (2) 3 E. & E. 623; 30 L. J. (Q.B.) 102.
(3) Law Rep. 10 C. P. 679.

belonging to the society out of which they could satisfy the plaintiff's claim, &c.

The 6 & 7 Wm. 4, c. 32, s. 4, extended to societies under that Act the provisions of 10 Geo. 4, c. 56; and it was contended that, inasmuch as by s. 27 of this Act the legislature had provided that every society should possess rules for referring all disputes between the society and its members either to justices or arbitrators, it must be assumed, in any action brought by a member against the society through its trustees, that such rules existed, and if so, that no other mode could be legally adopted of settling such dispute.

To this contention it was answered, firstly, that the statement of claim does not shew that any dispute has arisen which could be referred to arbitration, for that it is quite possible that all parties are agreed as to the plaintiff's right, and that the society merely do not choose to pay.

I think, however, that the statement of claim must be read in such a way as to shew a dispute arisen between a member and the society. The only right the plaintiff sets up under this statement of claim is a right acquired by membership; and there is no allegation on the face of the statement of claim that the plaintiff has ceased to be a member by reason of his notice of withdrawal: consequently, if he claims payments arising wholly from his membership and its rights according to the rules, and the defendants refuse to pay him the claims he makes for payments so arising, it follows that they themselves raise a dispute between the society and an individual member thereof within s. 27 which must be disposed of by one of the two methods provided for by that section. I think, therefore, that it is clear that I am bound to hold that there is a dispute which *might* be referred to arbitration or disposed of by justices, if, as I am bound to suppose, a rule exists as to the reference of such disputes, as provided by s. 27 of 10 Geo. 4, c. 56.

The case of *Wright* v. *Deeley* (1) is an authority that the mere notice of withdrawal given and assented to does not prevent the application of a rule providing for arbitration, and that an action will not lie for a matter within the rule, at the suit of a member

(1) 4 H. & C. 209.

1877

HUCKLE v. WILSON.

who has given such notice, any more than it would in the case of a member who has given no such notice. The principle of that case seems to me to apply to the present; for, this being a dispute between a member and the society, I think it follows, in the absence of any statement to the contrary, that it must be assumed that there is in existence a rule providing that such dispute should be referred either to arbitrators or to justices, according to the requirements of s. 27.

The case of *Ex parte Payne* (1) was the case of a member who had withdrawn from the society, and afterwards brought an action in the county court against the trustees. Upon a mandamus to the county court judge to hear the case, it was held by Erle, J. that no right of action existed: and in *Reeves* v. *White* (2), Lord Campbell, C.J., delivering the considered judgment of himself and Patteson, Coleridge, and Wightman, JJ., says: "The other authorities relied upon to shew that in all cases the society" (that being an action by trustees) "has an option either to refer or bring an action, do not outweigh *Ex parte Payne* (1) and *Crisp* v. *Bunbury* (3), and, upon an attentive consideration of the words of the Act of Parliament, they appear to us to be not merely permissive, but to enact that where there may there *must* be a reference to the arbitrators." The case of *Thompson* v. *Planet Benefit Building Society* (4) was decided by Bacon, V.C., on the same principle: and, though there have been some cases in which a contrary view was adopted, I think that the weight of authority greatly preponderates in favour of this view of the law.

It was further contended that this statement of claim might be good, because it might be either that the defendants had refused to arbitrate, or that no arbitrators had been appointed, or that some other circumstances might exist which would prevent the application of the arbitration clause in the rules, or of s. 27 of 10 Geo. 4, c. 56.

But, assuming that such be really the state of facts, assuming, for instance, as suggested in *Reeves* v. *White* (5), the true state of

(1) 5 D. & L. 679; 18 L. J. (Q.B.) 197.

(2) 17 Q. B. at p. 1016; 21 L. J. (Q.B.) at p. 178.

(3) 8 Bing. 394.

(4) Law Rep. 15 Eq. 333.

(5) 17 Q. B. at p. 1016; 21 L. J. (Q.B.) at p. 178.

things to be that the plaintiff has been ready and willing to refer to existing arbitrators or to justices, and that the defendants have not been so ready and willing, nothing of the kind appears upon this statement of claim. The action is not brought for any neglect of duty in not appointing arbitrators or in refusing to refer in any shape; nor upon any decision of arbitrators or order of justices. It merely assumes that an action will lie against the trustees for the amount alleged to be due according to rule 13 of the society.

For the reasons above given, I do not think that any such action can be supported, in the absence of any statement of special facts shewing that the case is one to which s. 27 would not apply. I therefore give judgment for the defendants upon the demurrer: and it follows that I must hold that the appeal against the order of Huddleston, B., affirming the order of the master, who refused upon summons to strike out the demurrer as frivolous, must be dismissed with costs.

I have doubted much whether I ought to allow the statement of claim to be amended; on the ground that any amendment which could make a good cause of action would make an entirely new case. On the whole, however, I think I ought to allow an amendment, ordering the costs of the action already incurred to be borne by the plaintiff in any event.

The judgment upon the demurrer must therefore be for the defendants, allowing the demurrer and the costs of the defendants down to the present time: and the application to set aside the demurrer must be refused with costs: the plaintiff to have leave to amend as above mentioned within a week; otherwise final judgment.

*Judgment accordingly.*

Solicitor for plaintiff: *T. C. Russell.*

Solicitors for defendants: *Stoneham & Legge.*

1877
*April* 25.

[IN THE COURT OF APPEAL.]

PARKER *v.* THE SOUTH EASTERN RAILWAY COMPANY.
GABELL *v.* THE SOUTH EASTERN RAILWAY COMPANY.

*Railway Company—Bailment—Deposit of Property in Cloak-room—Ticket—Condition endorsed thereon—Knowledge of the Condition by Depositor.*

On the deposit of articles at the cloak-room at a railway station, a charge is made of 2*d.* for each, and the depositor receives a ticket, on the face of which are printed the times of opening and closing the cloak-room and the words "See back," and on the back there is a notice that the company will not be responsible for any package exceeding 10*l.* A placard upon which is printed in legible characters the same condition is also hung up in the cloak-room.

The plaintiff deposited his bag, of value exceeding 10*l.*, in the defendants' cloak-room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value the plaintiff swore that he took the ticket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article, that he did not read the condition at the back of the ticket, nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? The jury answered both the questions in the negative, and judgment was directed for the plaintiff:—

*Held*, by Mellish and Baggallay, L.JJ., that there ought to be a new trial, on the ground that there had been a misdirection by the judge, inasmuch as the plaintiff could be under no obligation to read the condition; and that the second question left to the jury ought to have been, whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition.

*Held*, further by Bramwell, L.J., that, on the above facts, it was a question of law, and that judgment ought to be entered for the defendants.

ACTIONS against the South Eastern Railway Company for the value of bags and their contents lost to the plaintiffs respectively by the negligence of the company's servants.

The plaintiff in each case had deposited a bag in a cloak-room at the defendants' railway station, had paid the clerk 2*d.*, and had received a paper ticket, on one side of which were written a number and a date, and were printed notices as to when the office would be opened and closed, and the words "See back." On the other side were printed several clauses relating to articles left by passengers, the last of which was, "The company will not be respon-

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

sible for any package exceeding the value of 10*l.*" In each case the plaintiff on the same day presented his ticket and demanded his bag, and in each case the bag could not be found, and had not been since found. Parker claimed 24*l.* 10*s.* as the value of his bag, and Gabell claimed 50*l.* 16*s.* The company in each case pleaded that they had accepted the goods on the condition that they would not be responsible for the value if it exceeded 10*l.*; and on the trial they relied on the words printed on the back of the ticket, and also on the fact that a notice to the same effect was printed and hung up in the cloak-room. Each plaintiff gave evidence and denied that he had seen the notice, or read what was printed on the ticket. Each plaintiff admitted that he had often received such tickets, and knew there was printed matter on them, but said that he did not know what it was. Parker said that he imagined the ticket to be a receipt for the money paid by him; and Gabell said he supposed it was evidence of the company having received the bag, and that he knew that the number on it corresponded with a number on his goods.

Parker's case was tried at Westminster on the 27th of February, 1876, before Pollock, B.; and Gabell's case was tried at Westminster on the 15th of November, 1876, before Grove, J. The questions left in each case by the judge to the jury were: 1. Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition?

The jury in each case answered both questions in the negative, and the judge thereupon directed judgment to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter judgment for them.

In Parker's case the defendants moved to enter judgment, and also obtained from the Common Pleas Division an order nisi for a new trial, on the ground of misdirection. The order was discharged, and the motion was refused by the Common Pleas Division. (1)

(1) See 1 C. P. D. 618, where the words printed on the ticket are set out at length.

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

The defendants appealed.

In Gabell's case the defendants applied to the Common Pleas Division for an order nisi for a new trial on the ground of misdirection, but the Court refused to grant the order. The defendants then moved for judgment and also obtained from the Court of Appeal an order nisi for a new trial, on the ground of misdirection.

The cases were heard together.

Feb. 6, 7. *Benjamin, Q.C.*, and *Bremner*, for the defendants. The plaintiffs sue on an alleged contract to keep the goods safely, but there is no contract if one party means one thing and the other party means something else; there must be a consensus ad idem.

[BRAMWELL, J.A. Not so; one of the parties may so conduct himself as to lead the other to believe that there was a contract.]

A man cannot make such a claim saying that he took the ticket, but took care not to read what was printed on it though he knew that it related to the goods deposited. The plaintiff proposes to the company that they shall do something for him, and they answer, "There are our terms." He had often taken similar tickets, and knew that they had on them printed matter, and he knew that he must give back the ticket in order to get back his goods. If the porter had said "Read this," the plaintiff could not recover if he asserted merely that he had not read what was printed; and where is the difference? *Henderson* v. *Stevenson* (1) was not a similar case; there the passenger took the ticket in a hurry, and knew nothing about it. Besides, in that case the company were common carriers bound to take the passenger on terms fixed by law; but the company are under no obligation to keep a cloak-room, and they have an absolute right to prescribe the terms on which they will accept articles left there. They are not even warehousemen, for they will only take small articles for the convenience of passengers. It is absurd to hold that for a charge of 2*d.* a company ought to become liable to make good a loss of perhaps hundreds of pounds. *Harris* v. *Great Western Ry. Co.* (2) was a stronger case. A man is not compelled to read a contract in order to be

(1) Law Rep. 2 H. L., Sc. 470. (2) 1 Q. B. D. 515.

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

bound by it. Here the plaintiff took the ticket, and that implies an assent. The ticket contains the terms of the contract, and the plaintiff cannot, by refusing to read it, force on the company a different contract: *Lewis* v. *M'Kee*. (1) The company has not acted so as to induce the plaintiff to believe that they would be liable: *Cornish* v. *Abington* (2); and if the porter has done so he has exceeded his authority. The verdict ought to be entered for the defendants, or if not, then a new trial should be directed.

*Prentice Q.C.*, and *D. Brynmôr Jones*, for Gabell. The question is whether a man is bound by the contents of a printed paper merely put into his hands. It could not be pretended that any one would be bound by the terms printed on a turnpike ticket or a theatre ticket. The plaintiff says he thought the ticket was a voucher for the goods, as it was, and if so, why should he read it? It is not a question of law, but one of common sense, to be left to the jury. The company were clearly bailees for hire, and as such are primâ facie liable, and it is for them to shew that they are not.

*F. Pollock* (*Prentice, Q.C.* with him), for Parker. Suppose that the company had put on the ticket that if the goods were not redeemed within twenty-four hours they would be forfeited, or could not be redeemed except on payment of 5*l.*; would that have bound the plaintiff? It is no answer that that would be unreasonable, if the ticket is said to constitute a contract; nor is a depositor obliged to know what would be reasonable. To say that he is at his peril obliged to read this ticket, is to say that the general law of bailments is so absurd that a bailor must expect special conditions. No one can be expected to know that a receipt or a mere voucher given in order to secure the return of the article to the proper person contains special conditions. The questions were rightly put to the jury, and the verdict ought to stand.

*Bremner*, in reply. If the companies are for 2*d.* to incur indefinite liabilities they will shut up the cloak-rooms. It is admitted that the terms specified on the ticket are reasonable, and it is needless to speculate on what would be the consequence if the terms were unreasonable. The depositor had plenty of time to read what was printed, and if he did not he must take the consequences.

*Cur. adv. vult.*

(1) Law Rep. 4 Ex. 58. (2) 4 H. & N. 549; 28 L. J. (Ex.) 262.

1877

April 25. The following judgments were delivered. (1)

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

MELLISH, L.J. In this case we have to consider whether a person who deposits in the cloak-room of a railway company, articles which are lost through the carelessness of the company's servants, is prevented from recovering, by a condition on the back of the ticket, that the company would not be liable for the loss of goods exceeding the value of 10*l*. It was argued on behalf of the railway company that the company's servants were only authorized to receive goods on behalf of the company upon the terms contained in the ticket; and a passage from Mr. Justice Blackburn's judgment in *Harris* v. *Great Western Ry. Co.* (2) was relied on in support of their contention: "I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody." I am of opinion that this objection cannot prevail. It is clear that the company's servants did not exceed the authority given them by the company. They did the exact thing they were authorized to do. They were authorized to receive articles on deposit as bailees on behalf of the company, charging 2*d*. for each article, and delivering a ticket properly filled up to the person leaving the article. This is exactly what they did in the present cases, and whatever may be the legal effect of what was done, the company must, in my opinion, be bound by it. The directors may have thought, and no doubt did think, that the delivering the ticket to the person depositing the article would be sufficient to make him bound by the conditions contained in the ticket, and if they were mistaken in that, the company must bear the consequence.

The question then is, whether the plaintiff was bound by the

(1) The judgments of Mellish and Baggallay, L.JJ., were read by Bramwell, L.J.
(2) 1 Q. B. D. at p. 533.

conditions contained in the ticket. In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are. I hold therefore that the case of *Harris* v. *Great Western Ry. Co.* (1) was rightly decided, because in that case the plaintiff admitted, on cross-examination, that he believed there were some conditions on the ticket. On the other hand, the case of *Henderson* v. *Stevenson* (2) is a conclusive authority that if the person receiving the ticket does not know that there is any writing upon the back of the ticket, he is not bound by a condition printed on the back. The facts in the cases before us differ from those in both *Henderson* v. *Stevenson* (2) and *Harris* v. *Great Western Ry. Co.* (1), because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether, under those circumstances, we can lay down as a matter of law either that the plaintiff is bound or that he is not bound by the conditions contained in the ticket, or whether his being bound depends on some question of fact to be

(1) 1 Q. B. D. 515. (2) Law Rep. 2 H. L., Sc. 470.

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

determined by the jury, and if so, whether, in the present case, the right question was left to the jury.

Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

Now the question we have to consider is whether the railway company were entitled to assume that a person depositing lug-

gage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

I have lastly to consider whether the direction of the learned judge was correct, namely, "Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?" I think that this direction was not strictly accurate, and was calculated to mislead the jury. The plaintiff was certainly under no obligation to read the ticket, but was entitled to leave it unread if

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

he pleased, and the question does not appear to me to direct the attention of the jury to the real question, namely, whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition.

On the whole, I am of opinion that there ought to be a new trial.

BAGGALLAY, L.J. A railway company, in the conduct of their cloak-room business, become bailees for reward of the articles deposited with them for safe custody; and, as such, in the absence of any special contract constituted by the delivery and acceptance of a ticket or otherwise, are responsible to the depositors for the full value of the deposited articles, if unable to restore them when demanded. This clearly would be the nature of the contract if no ticket were delivered, as occasionally happens.

In the present cases the question for consideration is whether the ordinary contract of bailment, which would have resulted from the receipt by the company of the plaintiffs' property and the payment by the plaintiffs of the prescribed charges, has been modified by the delivery of the tickets which were admittedly accepted by the plaintiffs, though, as they allege, in ignorance of the purport or effect of the printed statements endorsed upon them. If the practice of issuing cloak-room tickets, containing statements of conditions intended to be binding on depositors, had become general, it might well be that a person depositing his property and accepting a ticket, even though himself ignorant of the practice, must be treated as aware of it, and as bound to ascertain whether any such conditions were stated on the ticket delivered to him; but no such practice has been shewn or even suggested in either of the present cases, nor does it, so far as I am aware, exist. The primary purpose of the ticket is to identify the articles deposited and the party entitled to reclaim them, but practically, and by reason of the recognised practice of not delivering the ticket until the prescribed charge has been paid, it becomes a voucher for the payment.

So far as these purposes are concerned, the depositor has no occasion to look at the ticket until he desires to reclaim his

property, and if the tickets were delivered for these purposes only, the ordinary contract of bailment would be in no respect modified by the delivery of them; and in the absence of any such general practice as that to which I have alluded, it appears to me that the depositor is primâ facie entitled to regard the ticket as delivered to him for these purposes only, and that he is in no way put upon inquiry whether the company have any further or ulterior object. But it is, of course, open to the company to shew, not only that they intended that the ticket, which was delivered to the depositor primarily for his own convenience and protection, should also indicate to him certain terms and conditions in favour of the company, by which he was to be bound, but also that he was aware of such intention at the time when he accepted the ticket and that he agreed to give effect to it; the onus of proof is, however, upon the company in respect of these matters. Of the intention of the company to modify the contract of bailment in the cases under consideration by limiting their liability, there can be no question. I also think that, if the plaintiffs were aware, or ought, for reasons which will be indicated presently, to be treated as being aware of the intention of the company at the time when they respectively received their tickets, and did not express their dissent, they must be regarded as having agreed to give effect to them.

The question then remains whether the plaintiffs were respectively aware, or ought to be treated as aware, of the intention of the company thus to modify the effect of the ordinary contract.

Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them. I think also that he would be equally bound if he was aware or had good reason to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such, or from making himself acquainted with their purport. But I do not think that in the absence of

1877

PAREER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

any such knowledge or information, or good reason for belief, he was under any obligation to examine the ticket with the view of ascertaining whether there were any such statements or conditions upon it.

Whether the plaintiff had any such knowledge or information, or good reason for belief, is a question of fact to be determined by the evidence. Had the determination of these questions of fact in the cases under consideration rested with myself, I should, upon the evidence, have decided in favour of the plaintiffs in both cases; but having had the opportunity of reading the proposed judgments of both my colleagues, I feel the force of the observations made by them as to the directions given to the juries by the judges who tried the actions. I do not think that the second question was quite right in form, though I think that had it been put in the form suggested by Lord Justice Mellish, which appears to me to be the more correct form, the same result would have followed. It is possible, however, though I think hardly probable, that the juries were misled by the form of the questions, and, under all the circumstances, the best course to pursue will be, I think, to direct a new trial.

BRAMWELL, L.J. It is clear that if the plaintiffs in these actions had read the conditions on the tickets and not objected, they would have been bound by them. No point was or could be made that the contract was complete before the ticket was given. If then reading the conditions they would have been bound, it follows that had they been told they were the conditions of the contract and invited to read them, and they had refused, saying they were content to take them whatever they might be, then also they would be bound by them. So also would they be if they were so told, and made no answer, and did nothing; for in that case they would have tacitly said the same thing, viz., that they were content to take them, whatever they might be. It follows, further, that if they knew that what was on the tickets was the contract which the defendants were willing to enter into, they, the plaintiffs, would be bound, though not told they were the conditions; for it cannot make a difference that they were not told what by the hypothesis they knew already. We have it, then, that if the

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

plaintiffs knew that what was printed was the contract which the defendants were willing to enter into, the plaintiffs, not objecting, are bound by its terms, though they did not inform themselves what they were. The plaintiffs have sworn that they did not know that the printing was the contract, and we must act as though that was true and we believed it, at least as far as entering the verdict for the defendants is concerned. Does this make any difference? The plaintiffs knew of the printed matter. Both admit they knew it concerned them in some way, though they said they did not know what it was; yet neither pretends that he knew or believed it was not the contract. Neither pretends he thought it had nothing to do with the business in hand; that he thought it was an advertisement or other matter unconnected with his deposit of a parcel at the defendants' cloak-room. They admit that, for anything they knew or believed, it might be, only they did not know or believe it was, the contract. Their evidence is very much that they did not think, or, thinking, did not care about it. Now they claim to charge the company, and to have the benefit of their own indifference. Is this just? Is it reasonable? Is it the way in which any other business is allowed to be conducted? Is it even allowed to a man to "think," "judge," "guess," "chance" a matter, without informing himself when he can, and then when his "thought," "judgment," "guess," or "chance" turns out wrong or unsuccessful, claim to impose a burthen or duty on another which he could not have done had he informed himself as he might? Suppose the clerk or porter at the cloak-room had said to the plaintiffs, "Read that, it concerns you," and they had not read it, would they be at liberty to set up that though told to read they did not, because they thought something or other? But what is the difference between that case and the present? Why is there printing on the paper, except that it may be read? The putting of it into their hands was equivalent to saying, "Read that." Could the defendants practically do more than they did? Had they not a right to suppose either that the plaintiffs knew the conditions, or that they were content to take on trust whatever is printed? Let us for the moment forget that the defendants are a caput lupinum—a railway company. Take any other case—any case of money being

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

paid and a paper given by the receiver, or goods bought on credit and a paper given with them. Take also the cases put by Byles, J., in *Van Toll* v. *South Eastern Ry. Co.* (1) Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms in the paper? What more can be done? Must he say, "Read that?" As I have said, he does so in effect when he puts it into the other's hands. The truth is, people are content to take these things on trust. They know that there is a form which is always used—they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. If they did, then dealing would soon be stopped. Besides, unreasonable practices would be known. The very fact of not looking at the paper shews that this confidence exists. It is asked: What if there was some unreasonable condition, as for instance to forfeit 1000*l.* if the goods were not removed in forty-eight hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told "our conditions are on this ticket," and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand. I am of opinion, therefore, that the plaintiffs, having notice of the printing, were in the same situation as though the porter had said, "Read that, it concerns the matter in hand;" that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected.

The difficulty I feel as to what I have written is that it is too demonstrative. But, put in practical language, it is this: The defendants put into the hands of the plaintiff a paper with printed matter on it, which in all good sense and reason must be supposed to relate to the matter in hand. This printed matter the plaintiff sees, and must either read it, and object if he does not agree to it, or if he does read it and not object, or does not read it, he must be held to consent to its terms; therefore, on the facts, the judges should have directed verdicts for the defendants.

The second question left, in my opinion, should not have been

(1) 12 C. B. (N.S.) at p. 87; 31 L. J. (C.P.) 241.

left, and was calculated to mislead the jury. It might equally have been put if the plaintiffs had been told that the conditions of the contract were on the ticket, and had been asked to read them. It would then manifestly have been a question of law, and so it is now. Besides, by its terms it was calculated to mislead the jury. The question was, whether the plaintiff was under any obligation, in the exercise of reasonable and proper caution, to read the ticket. Obligation to whom? Not to himself, as people sometimes say, for there is no such duty, or if any, he may excuse himself from performing it. If it means whether a reasonably and properly cautious person might omit to read it, I say Yes. At least I hope so. Such a person might well take the matter on trust, but then he ought to be content to take the consequences of so doing. But he has no right, having omitted to inform himself, and having had the means of doing so, to make a claim which he might have fairly made had he had no such means of informing himself. The question possibly means "obligation to the defendants." That is, had the plaintiff a right to omit to do so, and then make his claim? I repeat that the same question might be put if he were told that the print contained the conditions of the contract, and then it would obviously be a question of law as it is now. The question is imperfect. The question whether of law or fact is, "Can a man properly omit to inform himself, being able to do so, and then justly claim, when he could not have claimed if he had informed himself?" The latter part of the question is left out. The authorities are in favour of this view: *Stewart* v. *North Western Ry. Co.* (1); *Van Toll* v. *South Eastern Ry. Co.* (2) There is the opinion of Willes, J., in *Lewis* v. *M'Kee* (3), and, lastly, the case of *Henderson* v. *Stevenson* (4). I need not say if I thought that that case supported the judgment I should defer to it, but I cannot understand how that can be supposed. The plaintiff there said that he had never looked at the ticket or seen the notice on it, no one having directed his attention to either, and on this the House proceeded. The Lord Chancellor says: "Your Lordships may take it as a matter of fact that the respondent was not aware of that which was printed on the back of the ticket." Here the

(1) 3 H. & C. 135; 33 L. J. (Ex.) 199.
(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.
(3) Law Rep. 4 Ex. 58.
(4) Law Rep. 2 H. L., Sc. 470.

8 Jur. N.S. 1213.
(3) S.C. 10 Jur. N.S. 805

1877

PARKER v. SOUTH EASTERN RAILWAY CO.
GABELL v. THE SAME.

plaintiffs knew there was printed matter, and must have known it concerned them. The Lord Chancellor adds: "The passenger receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shewn to him." I am of opinion, therefore, that the judgment should be reversed, and be given for the defendants. If not, though I think the question one of law, still, if it is of fact, it has not been left to the jury, and there should be a new trial. The possible question of fact is that set forth in the judgment of the Lord Justice Mellish, with a perusal of which he has favoured me. But I repeat I think it is a question of law. I also think the verdict against evidence, and that on that ground there should be a new trial. No one can read the evidence of the plaintiffs in this case without seeing the mischief of encouraging claims so unconscientious as the present.

*Orders absolute for new trials.*

Solicitor for Parker: *G. W. Digby.*
Solicitor for Gabell: *M. J. Pyke.*
Solicitor for the company: *W. R. Stevens.*

---

*June 6.*

[IN THE COURT OF APPEAL.]

GRANT AND OTHERS *v.* THE BANQUE FRANCO-EGYPTIENNE.

*Practice—Security for Costs—Rules of Court*, 1875—*Order LVIII., Rule* 15—"*Special circumstances.*"

The fact that an appellant is a foreigner domiciled abroad with no assets in this country, is a "special circumstance" within Order LVIII., Rule 15, and entitles the respondent to security for costs of appeal from an interlocutory order.

THE verdict having passed for the defendants, the plaintiffs obtained an order for a new trial. The defendants appealed.

The plaintiffs applied for security for costs under Order LVIII., Rule 15.(1)

The defendants were a French corporation, having their place of business in France, and had no assets in this country.

An affidavit by a French advocate was filed to the effect that,

(1) See W.N. (1875) P. II. 363.

1877

GRANT v. BANQUE FRANCO-EGYPTIENNE.

in actions brought in the French courts upon foreign judgments, those courts exercise the right of reconsidering, and, if they think it advisable, reversing the decision of the foreign tribunal; and also that in dealing with the question of costs recovered in an English court the French courts would probably apply the French scale of taxation, which is considerably lower than the English, the maximum allowance for counsel, as between party and party, being only fifteen francs.

*Lumley Smith* (*Murphy, Q.C.*, and *Julian Robinson*, with him), for the plaintiffs.

*Anderson* (Sir *H. James, Q.C.*, with him), for the defendants.

COCKBURN, C.J. I think that in this case there ought to be an order for security as prayed. The position of the bank, being that of foreigners resident abroad, is a special circumstance within the meaning of the rule; and especially as here the parties are not in pari periculo, for if the defendants are successful in their appeal they will recover their costs upon the higher scale of taxation allowed in the English courts, whereas if the plaintiffs succeed they will have to sue for their costs in the French courts, where not only will such costs be probably taxed upon the lower French scale, but they will have to run the risk of the judgment recovered here being altogether set aside.

BRAMWELL, L.J. I am entirely of the same opinion, and for the same reasons.

BRETT, L.J. I am of opinion that the fact that the appellants are foreigners not domiciled in England is of itself a "special circumstance" within the rule sufficient to entitle the respondents to security for the costs of the appeal.

*Order for security as prayed.*

Solicitors for plaintiffs: *G. S. & H. Brandon.*
Solicitor for defendants: *A. G. Dillon.*

1877
Feb. 6.

THRIFT *v.* YOULE & Co.

*Shipping—Bill of Lading—Liability of Shipowner—"Not accountable for Rust, Leakage, or Breakage."*

The defendants caused to be shipped on board the plaintiff's vessel bales of palm-baskets and barrels of oil, under a bill of lading containing the clause, "Not accountable for rust, leakage, or breakage." During the voyage some of the oil escaped from the barrels, and damaged the palm-baskets:—

*Held*, that the clause in the bill of lading, exempting the plaintiff from responsibility for "leakage," did not extend to damage caused by the oil which had escaped from the barrels, and that the plaintiff was liable to compensate the defendants for the injury done to the palm-baskets.

This was an action brought in the City of London Court to recover the sum of 12*l.* 10*s.* 10*d.*, being the balance of freight due for the carriage of the defendants' goods in the plaintiff's vessel, *Susannah Thrift*, from Villa Real, in Portugal, to London. The defendants gave notice of a counter-claim for 23*l.* 0*s.* 6*d.*, in respect of damage done to the defendants' goods shipped on board the *Susannah Thrift*.

The following were the material facts:—F. R. Tenorio, a merchant at Villa Real, shipped on board the *Susannah Thrift* 100 barrels of oil and 106 bales of palm baskets, consigned to the defendants. The captain signed a bill of lading for these goods containing the words, "Not accountable for rust, leakage, or breakage." Upon delivery of the goods to the defendants at the conclusion of the voyage, two barrels of oil were found to be quite empty, and out of the 106 bales of palm baskets no less than sixty bales were damaged with oil; and about fourteen of the sixty bales were crushed as well as saturated with oil from having been used as broken stowage on board the *Susannah Thrift*. At the time of shipment the goods consigned to the defendants were in sound and proper condition.

At the trial in the City of London Court the defendants admitted that the balance of freight claimed by the plaintiff had not been paid, and they did not seek to hold the plaintiff liable in respect of the oil which had escaped from the two barrels; but they claimed to recover the above-mentioned sum of 23*l.* 0*s.* 6*d.* for the injury done to the sixty bales of palm baskets. The judge

was of opinion that, under the words of the bill of lading, the plaintiff was exempt from all liability in respect of leakage, but he allowed the defendants a sum of £5 15*s.* 1*d.* as damages for the injury to the bales used as broken stowage; he accordingly deducted that amount from 12*l.* 10*s.* 10*d.* claimed by the plaintiff, as already mentioned, and gave judgment for her for 6*l.* 15*s.* 9*d.*

A rule had been obtained to set aside the judgment for the plaintiff and to enter judgment for the defendants for the sum of 10*l.* 9*s.* 8*d.*, the balance of their counter-claim of 23*l.* 0*s.* 6*d.*, after deducting therefrom the sum of 12*l.* 10*s.* 10*d.*, admitted to be due to the plaintiff for freight.

*Charles Hall* shewed cause. The only point to be now considered is, whether the clause in the bill of lading exempting the plaintiff from liability for leakage extends to damage done by leakage to other goods; and its words are wide enough to comprehend every mischief incident to the escape of the oil. There are no authorities precisely in point, but so far as they go, the previous decisions are in favour of the plaintiff. In *The Helene* (1) it was held in the Privy Council that where by a bill of lading the shipowner is not accountable for leakage, he is protected as to all leakage except that caused by negligence. In *The Nepoter* (2) the plaintiffs were consignees of some casks of sugar shipped under a bill of lading containing a memorandum "not liable for leakage:" the drainage from other casks, instead of being allowed to escape, was left to accumulate round the plaintiff's casks, and caused the sugar therein to heat and to deteriorate in value. Sir R. Phillimore held that the shipowners were liable on the ground that it was the accumulation of drainage, and not the leakage itself, which caused the injury; but he seems to have been of opinion (p. 380) that if the leakage had directly produced the mischief, the memorandum in the bill of lading would have exempted the shipowners from responsibility.

*J. A. McLeod*, in support of the rule, was stopped.

GROVE, J. I am of opinion that the rule must be made absolute to enter judgment for the defendants for the sum of 10*l.* 9*s.* 8*d.*

(1) B. & L. 429. (2) Law Rep. 2 A. & E. 375.

1877

THRIFT v. YOULE & Co.

The words in the bill of lading simply mean that if the goods shipped are injured by rust, or if the casks containing them become leaky or are broken, the shipowner is not to be accountable; there is nothing in the bill of lading to shew that the clause is to be extended to remote consequences; and the ulterior injury arising from leakage may be of a very important kind, and nevertheless of a totally different nature: suppose, for instance, that a cask of spirits leaks, and that what escapes from it catches fire and destroys other goods; I think that this clause would not protect the shipowner from liability to compensate the owner of the goods burnt. The words "rust" and "breakage" go to shew that the limited construction of "leakage" is the proper interpretation; for it is difficult to understand how rust or breakage can be mischievous to any goods besides those which themselves become rusty or are broken. For these reasons, I think that the clause in the bill of lading does not extend to collateral consequences.

The cases which have been cited do not assist the argument for the plaintiff. I need only say that in *The Nepoter* (1) Sir R. Phillimore really expressed no opinion bearing upon the facts before us; and if he had, it would have amounted merely to obiter dictum; the injury was the indirect consequence of the accumulation of the drainage, and did not arise from the leakage itself. I do not think that that case has any relation to the present.

DENMAN, J. I am of the same opinion. The sole question for our consideration is the meaning of the word "leakage." Some goods, such as oil stored in barrels, are apt to leak; and by the insertion of this word it was intended to protect the shipowner from liability to compensate the owner of the goods for the waste occasioned by leakage. I do not think the word can have a more comprehensive meaning. In like manner, by the use of the word "breakage," it was merely intended that the shipowner should be absolved from liability in respect of goods broken during the voyage; it would be absurd to suppose that it could extend to damage done by the broken goods to other goods. I only wish to add that the judgment of Sir R. Phillimore in *The Nepoter* (1), so

(1) Law Rep. 2 A. & E. 375.

far as it goes, is in favour of our decision; for he confined the meaning of the word to the liquor which escaped from the casks, and declined to extend it to an accumulation of drainage which indirectly caused the mischief.

1877

THRIFT v. YOULE & Co.

*Rule absolute.*

Solicitors for plaintiff: *Henderson & Buckle.*
Solicitors for defendants: *Parker & Clarke.*

---

[IN THE COURT OF APPEAL.]

EYRE *v.* SMITH.

*July* 26.

*Bankruptcy—Liquidation by Arrangement—Validity of Resolutions—Fraud—Jurisdiction of High Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 10, 12, 72, 125, 127—*Bankruptcy Rules*, 1870, *Rules* 289, 301.

The High Court of Justice has jurisdiction to inquire and decide whether fraud has been committed in the registration of a resolution for liquidation by arrangement under the Bankruptcy Act, 1869, ss. 125, 127; and therefore where in an action of debt the defendant pleads that he has liquidated his affairs by arrangement and that the debt sued for is provable under the proceedings, the plaintiff is at liberty to reply and prove that the registration of the resolution for liquidation in the Court of Bankruptcy has been procured by fraud, and is therefore invalid.

APPEAL from the judgment of Denman, J., overruling a demurrer to the reply in this action.

Action (commenced in August, 1876) by plaintiff as indorsee of a bill against the defendant as acceptor.

Defence, that during the currency of the bill "proceedings for liquidation by arrangement or composition with creditors were instituted by the defendant, pursuant to the Bankruptcy Act, 1869, and the defendant's creditors resolved that the defendant's affairs should be liquidated by arrangement, and not in bankruptcy, and the creditors appointed Henry Dever trustee of the defendant's property and effects. The resolution was registered on the 8th of February, 1876, and is now in full force and effect, and the debt for which this action is brought is a debt provable in the said proceedings."

Reply, first, joining issue upon the defence, and, secondly, "that the registration of the said resolution was procured by the fraud

1877

EYRE v. SMITH.

of the defendant in fraudulently representing to the registrar that the resolution was duly passed, and that the requisitions of the Bankruptcy Act in respect of such resolution were duly complied with. The defendant fraudulently omitted from his list of creditors persons whom he knew to be creditors, and who he knew or suspected would vote against the resolution, and fraudulently included in his list of creditors persons who were not creditors at all, but who were willing to vote, and did vote, in favour of the resolution. The requisite majority for the passing of the resolution was obtained by the list of creditors being so fraudulently made out as aforesaid."

The defendant demurred.

1877. June 14. *Darling*, for the defendant.
*Channell*, for the plaintiff.

THE COURT (Denman, J.), gave judgment for the plaintiff, holding that s. 127 was of general application, and that it was impossible that the resolution could be recognised as valid before one tribunal, and yet be liable to be declared invalid by another.

The defendant appealed.

1877. July 26. *Ince*, *Q.C.*, and *Finlay*, for the defendant. The High Court has no jurisdiction to try the validity of a resolution for liquidation by arrangement, or if it has, the jurisdiction should not be exercised, because it is much more convenient that the question of fraud should be tried in the Court of Bankruptcy, which, under s. 72 of the Act of 1869, has full jurisdiction to deal with it, and would decide it once for all as between the debtor and all his creditors, and not, as in an action, between the debtor and one creditor only. *Martin* v. *Powning* (1) shews that under the Bankruptcy Act of 1861 a similar question to this could have been raised by demurrer. By s. 125, sub-s. 7, of the Bankruptcy Act, 1869, the appointment of a trustee under a liquidation is made equivalent to an adjudication of bankruptcy, and s. 12 provides that after an adjudication of bankruptcy no creditor shall have any remedy against the property or person of the bankrupt in respect of a provable debt, except in manner directed by the Act; and by s. 127 the

(1) Law Rep. 4 Ch. 356, at pp. 366, 367.

registration of the resolution is conclusive of its validity, except in the case of fraud. Rule 289 of the Bankruptcy Rules, 1870, provides that every creditor in respect of a provable debt, shall, in the event of a liquidation by arrangement being resolved on, even though he had no notice of the general meeting, be absolutely restrained from commencing or continuing or enforcing any proceedings whatsoever against the debtor or his property, unless the Court of Bankruptcy shall be of opinion that his rights have been prejudicially affected by the resolution, and by Rule 301 the passing of the special resolution is to be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the statute, with regard to the statement of his affairs required to be submitted to the general meetings of his creditors. If the passing and registration of the resolution have been procured by fraud the proper course is to apply to the Court of Bankruptcy to vacate the registration: *Ex parte Walter*. (1)

[BAGGALLAY, L.J. There the question was only as to the proper course of procedure in the Court of Bankruptcy.]

*Ex parte Jones* (2) shews that after the registration of the resolution a creditor can have the debtor examined in the Court of Bankruptcy as to his affairs, on shewing a *primâ facie* case of fraud.

[JAMES, L.J. Why did not the defendant apply to the Court of Bankruptcy to restrain the proceedings in the action?]

He might have done so, but he was equally entitled to adopt the course he has taken. In *Martin* v. *Powning* (3) the Court of Chancery declined to interfere with the administration of the trusts of a creditors' deed under the Bankruptcy Act, 1861, though that Act contained no such stringent clause as s. 127 of the Act of 1869. *Stone* v. *Thomas* (4) was a still stronger case of the same kind.

[JAMES, L.J. That principle cannot, I think, apply to the High Court. Formerly, no doubt, the Court of Chancery had a discretion as to the exercise of its jurisdiction, but that was not so with the Common Law Courts. If a man came into a Common Law Court with a legal demand, he was entitled to relief ex debito justitiæ.]

(1) 2 Ch. D. 326, 334.
(2) Law Rep. 16 Eq. 386.
(3) Law Rep. 4 Ch. 356.
(4) Law Rep. 5 Ch. 219.

1877

EYRE v. SMITH.

In *Ex parte Pannell* (1) the Court of Appeal exercised a discretion as to whether proceedings in bankruptcy, to set aside an equitable mortgage given by a bankrupt, should go on pending an action in the Chancery Division by the equitable mortgagee against the trustee in bankruptcy for the realization of the security by foreclosure. In former times, no doubt, the validity of an adjudication of bankruptcy could be challenged in an action at law: *Horn* v. *Ion.* (2) But that cannot be done now. In *Ex parte Hartel* (3) Lord Justice Mellish speaks of the inconvenience of having the question of the validity of a composition tried in a number of actions brought by different dissentient creditors, and says that where the question is one which affects the creditors generally it should be tried once for all in the Court of Bankruptcy.

[COTTON, L.J. There the question was whether an injunction should be granted to restrain the proceedings in an action.]

It would be extremely inconvenient that such questions should be tried in the Common Law Divisions, and as to that the principle of *Martin* v. *Powning* (4) applies.

*Channell*, for the plaintiff, was not heard.

JAMES, L.J. I am of opinion that we cannot say that the High Court is precluded from trying the issue raised in this action. The action is brought upon a bill of exchange accepted by a liquidating debtor. The debtor did not apply to the Court of Bankruptcy to restrain the proceedings in the action, which was the natural course to have adopted, but he pleaded to the action, alleging the liquidation resolutions as a defence. It seems to me utterly out of the question that he can deprive his opponent of the opportunity of saying in the action that the liquidation proceedings were a fraud, and I am clearly of opinion this question must be tried in the Court in which the action has been brought. What might have been the result of an application to the Court of Bankruptcy for an injunction to restrain the proceedings in the action it is not necessary for us now to say.

BAGGALLAY, L.J. I am of the same opinion. It seems to me

(1) Not yet reported.
(2) 4 B. & Ad. 78.
(3) Law Rep. 8 Ch. 743, 745.
(4) Law Rep. 4 Ch. 356.

1877

EYRE v. SMITH.

clear that the High Court has the power of trying the question whether the registration of liquidation resolutions has or has not been obtained by fraud. *Martin* v. *Powning* (1) was not decided upon demurrer, though no doubt it amounts to a decision that the question there raised by plea could have been raised by demurrer. But the distinction between that case and the present is this, that s. 197 of the Bankruptcy Act, 1861, was absolute in its terms and made no exception in the case of fraud, whereas s. 127 of the Bankruptcy Act, 1869, makes the registration of the resolutions conclusive only in the absence of fraud.

COTTON, L.J. I am of the same opinion. In my view the only question upon this demurrer is whether the matters pleaded are a bar to an action in that Court in which, under ordinary circumstances, the plaintiff has a right to proceed. The question of convenience cannot be now considered; that would be a question for the consideration of the Court of Bankruptcy. It is said that the appointment of a trustee under a liquidation has the same effect as an adjudication of bankruptcy; but that assumes that the special resolution has been validly passed. What then is there to prevent the High Court from determining whether there is a valid resolution? There is a marked distinction drawn in the Bankruptcy Act in this respect between bankruptcy and liquidation. By s. 10 an order of adjudication of bankruptcy is made absolutely conclusive of the validity of the adjudication. But in the case of a resolution for liquidation fraud is excepted, and the registration of the resolution is made conclusive of its validity only in the absence of fraud. The case of fraud is excepted and is left to be dealt with by the ordinary tribunals. It was no doubt thought by the legislature to be much more likely that fraud might take place in the passing of liquidation resolutions than in the obtaining an adjudication of bankruptcy, and it therefore left this case to be dealt with by the ordinary tribunals.

*Appeal dismissed.*

Solicitors for plaintiff: *G. L. P. Eyre & Co.*
Solicitors for defendant: *E. Doyle & Sons.*

(1) Law Rep. 4 Ch. 356.

1877
*April* 23.

SOPER, PETITIONER; MAYOR OF BASINGSTOKE AND OTHERS, RESPONDENTS.

*Municipal Election—Nomination Paper—Burgess Roll—Situation of Property of Seconder—Alteration of Name of Street—Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *sub-ss.* 2, 3, *and sch.* 1, *form* 2—"*Situation of the Property in respect of which he is enrolled on the Burgess Roll.*"

5 C.P.D. 256
258,

S. was nominated a candidate for the office of councillor in the borough of B.; in his nomination paper his seconder was described as of H. Street. The situation of the property of the seconder was described on the burgess roll as being in W. Street. The street was generally known as H. Street, and its name had been only recently changed to W. Street; no one had been or could be misled by the description thereof as H. Street. The mayor of B. having declared the nomination paper to be void on the ground that the seconder of S. had improperly described the situation of the property, in respect of which he was enrolled on the burgess roll:—

*Held*, that the situation of the property of the seconder was sufficiently described, and that the decision of the mayor was wrong.

MUNICIPAL Election Petition. Special case under 35 & 36 Vict. c. 60, s. 15, and No. 37 of Gen. Rules of Michaelmas Term, 1872.

An election was held for the borough of Basingstoke on the 1st of November, 1876, for the purpose of electing four councillors for the borough; the four respondents, J. Curtis, P. Moore, G. Painter, and H. M. Powell, were declared duly elected as being the only candidates duly nominated. The petitioner was, with the respondents, a candidate for election as councillor, and was duly qualified. He was nominated by means of a nomination paper, as provided by the Municipal Elections Act, 1875, c. 40, s. 1, sub-s. 2, and sch. 1, form 2 (1), and the nomination paper

(1) By the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, sub-s. 2, at any municipal election of councillors, auditors, and assessors, "every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination . . . The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2, set forth in the first schedule to this Act, or to the like effect."

Sub-s. 3: "The mayor shall attend at the Town Hall . . . and shall decide on the validity of every objection made to a nomination paper, such objection to be made in writing . . . The decision of the mayor . . . shall, if disallowing any objection to a nomination

was signed by a proposer, a seconder, and thirteen assenting burgesses; the signature of the seconder, and the description of his property, appeared upon the nomination paper as follows:— "649, John Owen, of High Street." The situation of the property, in respect of which the seconder of the petitioner was enrolled on the burgess roll of the borough, was described on the burgess roll as being in "Winton Street." The street always had been and still was generally known by the name of "High Street," and this name had only very recently been changed from "High Street" to "Winton Street" or to "Winchester Street" (which was the name appearing as painted upon the street); no one in fact was or could be misled by the description thereof as "High Street" instead of "Winton Street" or "Winchester Street." In the course of the proceedings before the mayor of the borough, for the purpose of deciding upon objections to nomination papers, as provided by 38 & 39 Vict. c. 40, s. 3, an objection was made to the nomination paper of the petitioner, on the ground that the petitioner's seconder had improperly described the situation of the property for which he was enrolled on the burgess roll: the mayor allowed the objection, and declared the nomination paper of the petitioner to be void; and the petitioner being thereby disqualified from being elected, and the number of candidates being reduced to the number of vacancies to be filled up, the mayor in due course published the names of the four other candidates, respondents to the petition, as the persons duly elected.

The question for the opinion of the Court was, whether the objection was good in substance.

*Arthur Charles, Q.C.* (*Lord* with him), for the petitioner. The question to be determined is, whether it is necessary to describe

---

paper, be final, but if allowing the same shall be subject to reversal on petition questioning the election or return."

In sch. 1 a form (No. 2) of nomination paper is given, whereby it is required to state the names, abode, and description of the candidate; the paper is to be signed by the proposer, seconder, and eight other burgesses, and it is directed that "the number on the burgess roll of the burgess subscribing with the situation of the property in respect of which he is enrolled on the burgess roll" shall be stated.

1877

SOPER v. MAYOR OF BASINGSTOKE.

in a nomination paper the property of the seconder of a candidate at a municipal election in the same manner, in which it is described on the burgess roll; it is submitted that it is only requisite to give such a description as may enable the property to be identified; and here it is stated as a fact that no one was or could be misled by the description of High Street. In *Mather* v. *Brown* (1), decided under the Municipal Elections Act, 1875, it was no doubt held that a nomination paper was void in which only the initial letter of one of the Christian names of a candidate was inserted; but the ground of that decision was that the statute is imperative in requiring an accurate statement of a candidate's name; while it is necessary to set forth only "the situation of the property" of the proposer and seconder. In *Knowles* v. *Brooking* (2), decided under 6 Vict. c. 18, it was held that an objector was entitled to state his true place of abode instead of that, by which he was erroneously described in the register of parliamentary electors.

*Crump*, for the respondents. Form No. 2 given in the schedule of the Municipal Elections Act, 1875, must be rigidly complied with. The burgess roll ought to be the sole guide in ascertaining the identity of the parties to the nomination. *Mather* v. *Brown* (1) is a direct authority for the respondents, being decided upon the statute in question. It is plain from *Reg.* v. *Tugwell* (3), and *Reg.* v. *Plenty* (4), that any informality in a nomination paper avoids it. The ground of decision in *Knowles* v. *Brooking* (2) was that the register wrongly stated the objector's place of abode, which was correctly stated in the notice of objection; and in *Melbourne* v. *Greenfield* (5), which was decided upon the authority of *Knowles* v. *Brooking* (2), it was held that an objector who had changed his place of abode was bound to state his new residence. The principle of these two cases, therefore, does not apply to the present; for here the burgess roll correctly stated the situation of the property belonging to the seconder of the candidate, and that property still belonged to him at the time of nomination. The address of the seconder was mis-described,

(1) 1 C. P. D. 596.
(2) 2 C. B. 226; 15 L. J. (C.P.) 197.
(3) Law Rep. 3 Q. B. 704.
(4) Law Rep. 4 Q. B. 346.
(5) 7 C. B. (N.S.) 1; 29 L. J. (C.P.) 81.

and this is a decisive objection to the nomination paper: *Calver* v. *Roberts*. (1)

*Charles, Q.C.*, was not called upon to reply.

DENMAN, J. I am clearly of opinion that judgment must be given for the petitioner. It appears that the street where the property is situate, in respect of which the petitioner's seconder is enrolled on the burgess roll, has been generally known by the name of High Street, but that it has been recently named Winton or Winchester Street, and, further, that no one was or could be misled by the description of the seconder's property as given upon the nomination paper. Upon these facts, the question to be determined is, whether a burgess signing a nomination paper as seconder must, under all circumstances, describe his property by the same name, by which it is described upon the burgess roll. This turns upon the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, sub-s. 2, and sch. 1, form 2, under which it is requisite that the nomination paper shall state the situation of the property in respect of which the burgess is enrolled; I think that the meaning of the legislature is that the property must be described in such a manner that it may be easily recognised, but that it need not necessarily be described in the nomination paper by the same terms by which it is described upon the burgess roll: sometimes it may be better to give a different description of it: for instance, after the burgess roll has been drawn up, a street may be altered by being subdivided into terraces or rows of villas; this not unfrequently happens, and in a case of this kind it would be more accurate to describe the property in the nomination paper by its new name than by the name under which it appears upon the burgess roll; it is the situation of the property and not its description upon the burgess roll, which is to be set forth upon the face of the nomination paper.

The case which has been most strongly relied upon by the respondents' counsel is *Mather* v. *Brown* (2), but I think that case is not against the petitioner; there the misdescription consisted of stating one of the Christian names of a candidate by the initial letter only; this was held to be such a misnomer as to render the

(1) 25 L. T. 751. (2) 1 C. P. D. 596.

1877

SOPER v. MAYOR OF BASINGSTOKE.

nomination paper void. That case seems to me widely different from the present, for the statute requires the Christian and surname of the candidate to be stated in the nomination paper, but it only directs that the situation of the property of the proposer and seconder shall be set forth. *Mather* v. *Brown* (1) went upon the principle, that the statute renders it necessary to state with scrupulous accuracy the names of the candidates; but I think that it does not extend to the mode of stating the name of the property of the proposer and seconder; and there seems to be a good reason for the distinction, because it often happens that the name of a street is changed, but a man seldom changes his name, and he cannot be said to have two names at the same time. The other cases cited on behalf of the respondents also seem to me to have no bearing upon the facts before us. The situation of the property belonging to the petitioner's seconder was properly stated to be in High Street, because every inhabitant of the borough would be able to recognise it under that description. The mayor ought not to have taken so strict a view, and ought to have overruled the objection.

LOPES, J. I also think that judgment ought to be given for the petitioner. The question raised for our determination is, whether it is necessary that the situation of the property of a candidate's seconder shall be stated upon the nomination paper in the same manner, in which it is stated upon the burgess roll. I think that the true meaning of the statute is simply that the situation of the property shall be indicated with sufficient clearness to enable it to be easily identified. I think that the property of the petitioner's seconder is sufficiently described in the nomination paper; for it appears from the facts before us that no one has been, and no one could be misled by inserting the name of High Street instead of Winton or Winchester Street.

*Judgment for the petitioner.*

Solicitor for petitioner: *G. Mayor Cooke.*
Solicitor for respondents: *J. Lott, for Bayley, Basingstoke.*

(1) 1 C. P. D. 596.

## GRANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

1877
*May* 29.

*Prerogative of the Crown—Compulsory Retirement of Military Officers—East India Company's Service—Libel—Publication in Gazette.*

In an action against the Secretary of State for India the claim stated that plaintiff accepted a commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the company's service, which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient —and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him and should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that the plaintiff was compelled to subscribe to a military fund to provide for widows and orphans of officers, and that if he had continued in the service his widow would have been entitled to an allowance out of a fund called "Lord Clive's Fund." That after the Indian forces had been transferred to the Crown he, while in the performance of military duty, and in all respects physically and mentally competent to perform any duties which were or might be required of him,—was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the Governor General of India with the sanction of the defendant, by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, &c., might be required to retire upon a pension; and, upon his declining voluntarily to retire, he was compulsorily placed upon the pension-list; and the fact of his removal to the pension-list was notified in the usual way by a general order of the Commander-in-Chief published in the *Gazette*:—

*Held*, on demurrer, that the claim disclosed no cause of action, for the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure, that the defendant could make no contract with a military officer in derogation of such powers; and the customs, regulations, &c., relied on by the plaintiff must be taken to be always subject to it, and incapable of superseding it, and further, that the publication in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be responsible in an action for libel.

CLAIM. 1. On the 3rd of January, 1840, the plaintiff was appointed to an ensigncy in the military service of the East India Company in the presidency of Madras, by a commission under the hand of the Right Hon. John Lord Elphinstone, the governor and Commander-in-Chief of the fort and garrison of Fort St. George, and the seal of the East India Company.

2. Plaintiff entered and accepted his commission upon the basis and faith of the customs, laws, regulations, and provisions of the

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

East India Company's service, and which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient, and should not leave the said service without the permission of the East India Company, and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, and that he should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that no officer or soldier should be punished for any military offence committed three years prior to the initiation of punitory measures.

3. In addition to the customs, rules, and regulations stated in the last paragraph, it was at the time the plaintiff entered the service as aforesaid, a compulsory regulation of the service that all persons nominated as cadets should be required, as a condition to their appointment, to subscribe to the military fund of the presidency to which they belonged. The objects of the institution of the said military fund were, to provide for the families, that is, the widows and orphans, of officers; and it was a provision of the institution that the amount of the subscription of officers should be and was regulated in proportion to their respective rank and pay, the subscriptions and donations of married officers being much larger than those of unmarried officers, and otherwise as provided by the several articles by which the institution was regulated.

4. The benefits to which the widows and orphans of officers were entitled out of the military fund consisted and consist of an annuity to the widow during her life or widowhood, an annuity to each son up to a certain age, and an annuity to each daughter during her life or until her marriage; and the amount of the annuity to the widow depended and depends upon the rank or length of service of the officer at the time of his death.

5. By the rules and regulations of the East India Company's service the subscriptions of officers to the military fund were retained by the military paymaster from the pay of officers before the issue of such pay.

6. The plaintiff is a married man, and ever since he entered the service his subscriptions and donations to the military fund have

always been paid or deducted from his pay, in proportion to his rank for the time being in the service and his position of a married man, in accordance with the regulations; and the amount contributed by him to the said fund exceeds 1300*l.*, and his subscriptions at the time he was removed from the service as hereinafter mentioned were 58*l.* per annum.

7. A further inducement held out by the East India Company to the plaintiff and other persons for entering their military service, and upon the faith of which he entered such service, were certain valuable advantages to which if he continued in the service his widow and orphans (if any) would if he had so long continued in the service of the company have been entitled out of a fund commonly called or known as "Lord Clive's Fund;" and by the regulations of the same fund the plaintiff's widow (if any) would have become entitled to an annuity of 114*l.* per annum.

8. The plaintiff continued from 1840 in the service of the East India Company under the circumstances before stated, down to 1858, in which year, by 21 & 22 Vict. c. 106, "An Act for the better government of India," it was (amongst other things) enacted that the government of the territories then in the possession or under the government of the East India Company, and all powers in relation to such government, should be vested in Her Majesty, and that the real and personal property of the company (except as therein mentioned) should vest in Her Majesty, subject to the debts and liabilities affecting the same (s. 39), and further, in effect, that Her Majesty's Secretary of State for India in Council should have and perform the several powers and duties in any wise relating to the government or revenues of India as might or should, except for that Act, have been exercised or performed by the East India Company (s. 3), and that the Secretary of State in Council might sue and be sued in India and England by the name of the Secretary of State in Council as a body corporate (s. 65): and it was by that Act further enacted that the military and naval forces of the East India Company should be deemed to be the Indian military and naval forces of Her Majesty, and should be under the same obligations to serve Her Majesty as they would have been to serve the company, and be entitled to the like pay, pensions, allowances, and privileges, and the like advantages as regarded

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

promotion and otherwise, as if they had continued in the service of the company (s. 56); and, further, that the transfer of any person to the service of Her Majesty should be deemed to be a continuance of his previous service, and should not prejudice any claim to pension or any claim on the various annuity funds of the several presidencies in India which he might have had if that Act had not been passed (s. 58).

9. By 29 Vict. c. 18, the funds belonging to the before-mentioned military fund were transferred to the government of India, subject to the rights of the subscribers therein and to the liabilities affecting the same; and the same government thereby became and are trustees of the same fund for the benefit of the plaintiff and his family.

10. The plaintiff in 1871 was promoted to the brevet-rank of colonel. In July, 1869, he was appointed officer in charge of military pensioners and family certificate holders at Kamptee, and performed the duties of that office up to January, 1873, without any charge or complaint ever having been made against him.

12 and 13. On the 12th of January, 1873, whilst the plaintiff was perfectly in possession of his physical and mental faculties, and was capable of continuing to perform the duties upon which he was then engaged as stated in the last paragraph, or any other duty which might have been imposed upon him, he was called upon by the adjutant-general of the Madras army to send in an application to retire from the service, on the pension to which he was then entitled, viz. 365*l.* per annum, under a general order, No. 797, dated the 1st of August, 1873, which was in the words and figures hereinafter stated in par. 17.

14. The plaintiff declined voluntarily to send in his application to retire, and continued to perform his duty, without any complaint as to his efficiency, up to the 14th of April, 1873, when he was compulsorily placed by the government upon the pension-list, by the General Order of that date in par. 17 stated.

15. The plaintiff, in April, 1873, was not in the position of the persons contemplated by and described in the aforesaid order, No. 797, and such order could not legally be applied to him, he being at the time referred to in the performance of military

duties, which he performed to the entire satisfaction of his immediate superior officer. And, even if he had been one of such persons, he never did any such act or was guilty of any such offence as was and is contemplated by the same Order; and the aforesaid compulsory retirement of the plaintiff was effected solely with the object of preventing him by length of service from obtaining the higher grade of pension, and saving the difference to the government.

16. The plaintiff has sustained pecuniary damage arising from the fact that he has been illegally deprived since April, 1873, of the pay and allowances which whilst in the service at the date of the General Order of the 14th of April, 1873, he was enjoying, and which present pecuniary loss exceeds 1800*l.*, and of the higher pension to which he would have been entitled had he remained in the service; and from the loss of his proper pay and allowances he is unable to keep up out of his present pension his subscription to the military fund; and the government of India, as hereinbefore stated, declare that if he fail to make any one necessary payment he will forfeit the pension to which his family may be entitled out of the fund. The plaintiff has under the circumstances stated been compelled to accept 365*l.* per annum, being the pension to which according to the rules of the service he was entitled after twenty-six years' service. If, however, the plaintiff had continued in the service for two years longer, he would have been entitled to a pension of 456*l.*; and if he had continued in the service until the 3rd of January, 1878, he would have been entitled to a pension of 1124*l.* per annum.

17. The plaintiff's character has been libellously defamed by the same government and the defendant, under the circumstances following, that is to say: The General Order, No. 797, dated the 1st of August, 1872, hereinbefore referred to, was partly in the words and figures following:—

The government of India, having been in communication with the Right Hon. the Secretary of State in regard to the measures to be adopted towards reducing the number of unemployed officers of the armies of the three Presidencies, the Governor-General in Council is pleased to publish for general information the following

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

Orders containing the final decision of Her Majesty's government:—

(3.) Unemployed officers who are ineligible for public employment by reason either of clear misconduct or proved physical or mental inefficiency, or who may have been removed from their employments for inefficiency, or who have by distinct and undeniable misconduct rendered themselves ineligible for regimental employment, will be called upon to send in their application to retire upon such pension as they may be entitled to under the regulations; and, if they should fail to do so within three months from the date of their being so called upon, they will be removed to the pension-list. Her Majesty's government do not object to special consideration being shewn, in the grant of the next higher rate of pension, to those officers who have in the opinion of the Governor-General in Council deserved well of the state, by reason of the length and character of their previous services.

The above-stated General Order was published in the *Gazette* and in the Madras Government Orders. The order removing the plaintiff from the effective list and compulsorily placing him on the pension-list hereinbefore referred to, and dated the 14th of April, 1873, was as follows:—

General Order, Fort St. George, Madras, 14th April, 1873.

Under the authority of Her Majesty's government notified in par. 3 of G. O. S. No. 797, dated 1st August, 1872, the under-mentioned officers are removed to the pension-list, from the dates specified,—

Colonel C. D. Grant, of the staff-corps, from the 13th April, 1873, on 365*l.* per annum.

By order of His Excellency the Commander-in-Chief.

The last-stated order was published in the *Gazette*, and thence copied into various local publications in India, where the plaintiff then was.

18. The plaintiff is the Colonel C. D. Grant referred to in the last-stated order. He was not at the date of the same order an "unemployed officer ineligible for public employment," being then engaged upon the duties hereinbefore mentioned. He was not of "proved physical or mental inefficiency." He had not "been removed from his appointment for inefficiency." And he had not "by distinct and undeniable misconduct rendered himself ineligible for regimental employment." After he left his

regiment in August, 1866, he was ordered and appointed to the staff-corps and otherwise employed as hereinbefore stated down to April, 1873, being a period of nearly seven years.

The plaintiff claimed to be restored to the position he held in the service before the issuing of the Order of the 14th of April, 1873, and to be paid the pay and allowances to which he was or except for that Order would be now entitled, and to have the full benefit to which he and his family were and would or might hereafter become entitled out of the aforesaid military and Lord Clive's funds respectively secured, preserved, and provided for, or otherwise.

To be paid 10,000*l.* by the defendant as damages in respect of the plaintiff's wrongful removal from his employment in the aforesaid service, and for the libellous defamation of his character under the circumstances hereinbefore set forth.

Demurrer, on the ground that "the plaintiff sought to obtain relief for injury by him sustained in consequence of orders passed and acts done by the defendant, as the executive government, on behalf of Her Majesty the Queen affecting the plaintiff in his capacity of an officer holding a commission in Her Majesty's Indian military forces.

The demurrer was argued before Grove, J., on the 10th and 12th of May, 1877, by *Sir James Fitz Stephen, Q.C.* (*Graham* with him), for the defendant, and *Grantham, Q.C.* (*Cotterell* with him), for the plaintiff.

*Cur. adv. vult.*

The arguments, statutory provisions, and authorities referred to on either side are fully noticed in the judgment.

May 29. GROVE, J. In this case, the plaintiff, formerly an officer in the East India Company's service, appointed in 1840, and subsequently continuing in the Indian army when the Indian military and naval forces were transferred to the Crown, brings an action against the defendant for damages for being on the 14th of April, 1873, compulsorily placed by the government upon the pension-list, and so compelled to retire from the army; and also for libel, the alleged libel being the publication in the *Indian Gazette* of his removal to the pension-list, purporting to be by

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

order of the commander-in-chief, and for which he alleges the defendant is responsible.

The statement of claim was demurred to, mainly on the ground that the orders were made and the acts were done by the defendant as the executive government on behalf of Her Majesty, affecting the plaintiff in his capacity of an officer holding a commission in Her Majesty's Indian Forces, and that it is not competent for this Court to adjudicate upon the validity or propriety of such orders or acts. Some objections were taken as to the form of this demurrer. I thought it sufficient to raise the points argued, offering to amend if required; but after an adjournment no amendment was required.

It was argued on behalf of the defendant that the dismissal or compulsory retiring of an officer by the Crown was an absolute right in the Crown over every military officer; and, as regarded the Indian forces, that this right had been given by statute to the East India Company, and that all its powers were transferred to the Crown when the territories and powers of government of the East India Company were transferred to the Crown; and, as to the claim in respect to libel, that the defendant was not liable as secretary of state for such publication in the *Gazette*.

For the plaintiff it was admitted for the purposes of this case that the Queen had in ordinary cases such power of dismissal or retiring; but it was contended that the East India Company had by a contract, express or implied, with its military officers, including the plaintiff, waived this right or contracted itself out of it, and that the plaintiff retained his rights under such contract as against the secretary of state for India representing the Crown; and that the defendant was responsible for the libel, though its publication was no personal act of his.

The alleged contract is set out in paragraph 2 of the statement of claim, as follows:—"Plaintiff entered and accepted his commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the said East India Company's service, and which were (amongst others) that an officer entering the said service should continue therein so long as he was physically and mentally efficient, and should not leave the said service without the permission of the

said East India Company; and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, and that he should be summoned to make his defence, having a reasonable time allowed him for that purpose; and that no officer or soldier should he punished for any military offence committed three years prior to the initiation of punitory measures." And it is further alleged (in pars. 3, 4, and 7),—I presume as tending to shew a status of irremovability,—that the plaintiff compulsorily subscribed to a military fund to provide for widows and orphans of officers, and that his widow would, if he had continued in the service, have been also entitled to certain advantages out of a fund known as "Lord Clive's Fund."

I am of opinion that the East India Company, and afterwards the Crown, had the absolute power to dismiss or compel retirement of an officer in the Indian army; that the power in the nature of Crown Prerogative, conferred upon the East India Company, being for the public benefit, the safety of the realm, and possibly the existence of the Indian empire, could not be waived by contracts with officers; that the relation of an officer to the East India Company and to the Crown is not in the nature of an ordinary contract; and, further, that the allegations and facts set out in paragraph 2 of the statement of claim do not, as stated, constitute a binding contract by which the East India Company abandoned or excluded their power of removal or dismissal at will, as I regard such statement as consistent with the customs, laws, regulations, and provisions being general regulations for the ordinary management of the forces, subject to be changed, if necessity or the better discipline or efficiency of the forces should so require.

Upon the claim for damages for libel, I am of opinion that a secretary of state is not liable for a publication in the *Gazette*, if done in the exercise of his duty as secretary of state,—at all events, when such so-called libel is not alleged to have been published maliciously and without reasonable and probable cause; that the publication in the *Gazette* being, as appears on the statement of claim, a correct statement of the act of the government, the secretary of state is not liable for libel; and that, the publication purporting to be published by order of His Excellency the

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

Commander-in-Chief, and there being no allegation that the secretary of state was personally privy to the publication, no cause of action is disclosed against him.

The 75th section of the statute 3 & 4 Wm. 4, c. 85, is as follows:—"Provided always, and be it enacted, that nothing in this Act contained shall take away the power of the said Court of Directors to remove or dismiss any of the officers or servants of the said company, but that the said Court shall and may at all times have full liberty to remove or dismiss any of such officers or servants at their will and pleasure: provided that any servant of the said company appointed by His Majesty through the default of appointment by the said Court of Directors shall not be dismissed or removed without His Majesty's approbation, as hereinbefore (s. 74) is mentioned." There is a similar provision in 33 Geo. 3, c. 52, s. 36.

The first-mentioned statute was to continue until the 30th of April, 1854. By 16 & 17 Vict. c. 95 (which received the Royal assent on the 20th of August, 1853), s. 1, reciting the above statute of 3 & 4 Wm. 4, the provisions of that Act were, save as altered, to continue in force until Parliament should otherwise provide, and the East India Company were to continue the government, in trust for Her Majesty.

The statute 21 & 22 Vict. c. 106, reciting the last-mentioned statute, enacts in s. 3, that, "Save as herein otherwise provided, one of Her Majesty's principal secretaries of state shall have and perform all such or the like powers and duties in anywise relating to the government or revenues of India, and all such or the like powers over all officers appointed or continued under this Act as might or should have been exercised or performed by the East India Company or by the Court of Directors or Court of Proprietors of the said company, either alone or by the direction or with the sanction or approbation of the commissioners for the affairs of India in relation to such government or revenues, and the officers and servants of the said company respectively, and also all such powers as might have been exercised by the said commissioners alone; and any warrant or writing under Her Majesty's Royal sign manual which by the Act of 17 & 18 Vict. c. 77 or otherwise is required to be countersigned by the president of the

commissioners for the affairs of India shall in lieu of being so countersigned be countersigned by one of Her Majesty's principal secretaries of state."

Several Mutiny Acts have been passed with respect to the Indian forces, ex. gr. 4 Geo. 4, c. 81, 3 & 4 Vict. c. 37, and 26 & 27 Vict. c. 48.

The East India Company, besides their powers to carry on trade as merchants, had by the above and previous statutes powers of sovereignty delegated to them. It is sufficient for this purpose to quote a passage from Lord Kingsdown's judgment in the case of *The Secretary of State for India* v. *Sahaba.* (1) "The subsequent statute, 3 & 4 Wm. 4, c. 85," he says, "in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of sovereignty."

The powers mentioned in the above-quoted section, of removal or dismissal of an officer at the will and pleasure of the company, it cannot, as it seems to me, be disputed belong to the class of such delegated powers, now restored to the Crown acting by the secretary of state for India. As this power exists for the benefit of the empire and of Her Majesty's subjects, it could not in my judgment be contracted away by the East India Company. If with one officer such a contract could be made, it could with all. In fact the plaintiff's case apparently is that it was made with all. If so, all officers whom a jury might consider to be "physically and mentally efficient" could retain their places in the army notwithstanding they were found to be most unsuitable for them. The consequences of such a state of things to the well-being of the realm would be most disastrous. It would prevent that power of dealing with officers according to their fitness for duty as judged by their superior officers; it would be fatal to the maintenance of discipline; and, in time of war, mutiny, or insurrection, might well be fatal to the state and commonwealth. It does not need enlarging upon.

In the case of *John Waller Poe* (2), which was an application for a prohibition to restrain the execution of the sentence of a court-martial, Lord Denman, in giving judgment, says (3): "If, then,

(1) 13 Moo. P. C. 22, at p. 77. (2) 5 B. & Ad. 681. (3) At p. 688.

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

the writ were to issue at all, we see no Court or individual to whom it could be addressed other than the King himself, who, acting on the sentence, has been pleased to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to His Majesty, when it is considered that this power is undoubtedly inherent in the Crown, and might have been lawfully executed even without any court-martial, it will at once appear manifest that no prohibition can lie in such a case; for, what the King had power to do independently of any inquiry, he plainly may do though the inquiry should not be satisfactory to a Court of law, or even though the Court which conducted it had no legal jurisdiction to inquire."

In *Gibson* v. *East India Co.* (1), which was a case of claim by the assignees in bankruptcy of a military officer of the East India Company for his retiring pension, Tindal, C.J., though of opinion that the East India Company might have made a grant under seal for the payment of the pension, says, speaking of a right of action for half-pay,—" Now, it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least unless the money has been specifically appropriated by the government and placed in the hands of the paymaster or agent to the account of the particular officer: and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case. It was, indeed, strongly argued at the Bar, that, as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of India, it has by such approval become obligatory on the company, and in the nature of a contract; but we think there is no ground for giving such operation to the Act. The object of the statute (33 Geo. 3, c. 52) was that of creating a board of commissioners to superintend, direct, and control, the acts, operations, and concerns relating to the civil and military government or revenues of the company's territories and acquisitions in the East Indies; to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that which it originally possessed. The

(1) 5 Bing. N. C. 262, 274.

grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations,—obligations which want the vinculum juris, although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound in foro conscientiæ to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a Court of law. Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a Court of law readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service in respect of which it is earned has been entirely completed? Not to mention the expense and inconvenience which must arise if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service. But, if the allowance of this pension will furnish a ground of action against the company, no legal distinction can be assigned why the grant of pay during actual service, which is authorized by general orders founded on resolutions of the directors, confirmed in the same manner by the board of commissioners, should not be equally the ground of an action at law."

In *Ex parte Napier* (1), which was an application for a mandamus to the East India Company to command them to pay arrears of pay to Sir C. Napier, due to him as Commander-in-Chief of the forces of the Queen and of the East India Company, Lord Campbell says (2): "The applicant must make out that there is a legal obligation on the East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established; for, the existence of a legal right or obligation is the foundation of every writ of mandamus; but it seems to us that the attempt to shew that there was any obligation on the East India

(1) 21 L. J. (Q.B.) 332. (2) At p. 333.

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

Company, which the law will enforce, to pay any sum of money to Sir Charles Napier, either as commander of the Queen's forces, or as commander of the native troops, has entirely failed. A legal obligation, which is the proper substratum of a mandamus, can only arise from common law, from statute, or from contract. Of course, the obligation here contended for cannot arise from the common law, and is not rested on contract." And, after going through several statutes relating to the East India Company, and referring to the case of *Gibson* v. *East India Company* (1), the rule for a mandamus was refused.

In a recent case, *In re Tuffnell* (2), which was a petition of right by a military surgeon for compensation for having been put on half-pay, he having, as alleged, on condition of waiving his right to promotion, been appointed to the permanent medical charge of the military prison at Dublin, and afterwards compulsorily retired on half-pay, Malins, V.C., held on demurrer that the Court had no jurisdiction to inquire into the circumstances under which he held the office, and that the office, like all others in the army, was only tenable durante bene placito.

In the case of *Dickson* v. *Lord Combermere and General Peel* (3), which was an action against the defendants for causing, by means of false charges, the removal of the plaintiff from the office of lieutenant-colonel of a regiment of militia, Cockburn, C.J., lays it down generally that a high officer of state is not responsible for an act done by him in the honest discharge of his public duty: and, upon counsel suggesting that "there may be an exception in the case of a judicial act," his Lordship says: "No; nor is this a judicial act at all. It is an exercise of the pleasure of the Sovereign through a high officer of state. The Sovereign has the power of dismissing any officer. He receives his commission from his Sovereign, and holds it at his pleasure; and it is in the will of the Sovereign to withdraw it. It is the will of the Sovereign to exercise that power through responsible servants of the Crown, and they are not responsible for its exercise before a jury."

Assuming that the East India Company could contract with a

(1) 5 Bing. N. C. 262. (2) 3 Ch. D. 164.
(3) 3 F. & F. 527, 585.

military officer, does the statement of claim disclose such a contract? The alleged contract is contained in paragraph 2, which I have already given verbatim. The statement does not say that the East India Company entered into an express binding contract not to dismiss him, or that it guaranteed or pledged itself that he should continue in the service so long as he was physically and mentally efficient, or that its rules should never be altered; but it alleges that he entered the service on the basis and faith of such "customs, laws, regulations, and provisions." The word "laws" in this paragraph, read with the context, I do not take to mean statutes or laws of the realm, but laws in the sense of rules, or analogous to by-laws. Doubtless, in many cases, as between individuals or companies or corporations, the entering a service upon rules stated by the dominant person or body would constitute a contract; but, military service being as I have stated in many particulars different from an ordinary service under a contract, it seems to me that the terms used in this paragraph must be taken in the sense of their proper application to military service, which is the service spoken of in the paragraph; and that, so read, they must be taken to refer to existing customs, laws, regulations, and provisions, subject to be changed by the necessities inherent in military regulations, and not overriding the power of dismissal or removing at will. Sect. 56 of 21 & 22 Vict. c. 106, does not, it seems to me, alter this view; perhaps it strengthens it by saying that the forces shall be subject to all Acts of Parliament, laws of the Governor-General of India, and articles of war, and all other laws, regulations, and provisions relating to the East India Company's military and naval forces respectively, as if Her Majesty's Indian military and naval forces respectively had throughout such acts, laws, articles, regulations, and provisions been mentioned or referred to instead of such forces of the said company.

The majority of officers enter the military or naval service on the basis and faith of the existing rules of the service; but this cannot be held to constitute a contract not to dismiss or remove them at will.

I am not wholly free from doubt on this second point, which doubt however only rests upon the technical necessity on demurrer

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

of assuming the truth of the facts alleged in the pleading demurred to.

With regard to the claim at the end of the plaintiff's statement, it is proper to observe that he does not claim a return of the money he has subscribed to the military fund, but only claims the ultimate benefit of it. I presume he is not prevented by the government from continuing to subscribe, as he states (par. 16) that from want of means he is unable to keep up his subscription. Whether, if he discontinues his subscription, he can recover the money paid, I am not called on to decide, as he does not claim the repayment of this money. And with regard to Lord Clive's Fund, under which the plaintiff states (par. 7) his widow and orphans, if any, would be entitled to certain valuable advantages, he states no present loss or damage or refusal to pay in the future.

If the widow or orphans of an officer removed to the retired list are by the rules of the service entitled to any advantage out of this fund, the plaintiff's widow and orphans will obtain it: any claims he may have are, as stated in 21 & 22 Vict. c. 106, s. 58 (preserved by 22 & 23 Vict. c. 27), not prejudiced by that Act. If in consequence of his removal he ceases to be entitled to them, and I am right that the East India Company had, and now the government has, the power of dismissing or removing him at will, the plaintiff must abide the consequences of the removal.

It may be worth observing that, by the judgment of the House of Lords, in 1863, in the case of *Walsh* v. *The Secretary of State for India* (1), the funds contributed by Lord Clive were held, after the transfer of the East India Company's forces to the Queen, to have, subject to existing annuities, become payable to the representatives of Lord Clive, by virtue of a covenant by the East India Company in the original deed.

The plaintiff secondly complains in his statement of claim of libel, alleging that his character has been libellously defamed by the government of India and by the defendant. The claim then sets out a general order (par. 17) for the removal to the pension list of unemployed officers ineligible for public employment by reason of (shortly stated) misconduct or physical or mental ineffi-

(1) 10 H. L. C. 367; 32 L. J. (Ch.) 585.

ciency. It further sets out a general order of the 14th of April, 1873, published in the *Gazette*, stating the removal of the plaintiff to the pension-list under the authority of Her Majesty's government, referring by number to the previous general order, and ending with the words "By order of His Excellency the Commander-in-Chief." It then (par. 18) states that the plaintiff was not ineligible for public employment within the terms of the order, and claims damages against the defendant.

It is to be observed that, by the statement of claim, the charge against the defendant is of an act in his official character as secretary of state for India, or rather of a responsibility attaching to him in his official character. He is not alleged to be personally cognizant of the publication in the *Gazette* of the 14th of April, 1873, which does not bear his name. Nor is it alleged that it was published maliciously and without reasonable and probable cause. The statement of claim, moreover, does not allege that the publication in the *Gazette* is not a true record of the act of the commander-in-chief, under the authority of Her Majesty's government.

In the case of *Gidley* v. *Lord Palmerston* (1), which was an action brought against the secretary at war by a retired clerk of the war office, for his retired allowance, Dallas, C.J., in giving judgment for the defendant says (2): "But it must also fail on another and a wider ground. This is an action brought against the defendant, as paymaster-general, for an alleged breach of an implied undertaking said to attach upon him in that character. With reference to this ground it will be sufficient to advert to a class of cases too well known and established to require to be more particularly mentioned, and which in substance and result have established that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be in the particular instance a breach of such employment, and constituting a particular and personal liability. Such persons, said Lord Mansfield in one of the cases cited at the bar (3), are not understood personally to contract; and in the same case it was observed by Mr. Justice Ashhurst, 'In great questions of policy, we cannot argue from the nature of private

(1) 3 B. & B. 275. (2) At p. 285.
(3) *Macbeath* v. *Haldimand*, 1 T. R. 172.

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

agreements.' . . . 'Great inconveniences would result from considering a governor or commander as personally responsible.' . . . 'No man would accept of any office of trust under government upon such conditions; and, indeed, it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt that the Crown will do ample justice to the plaintiff's demands, if they be well founded.' Mr. Justice Buller in the same case adds: 'Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.' And in a subsequent case (1), it is held that a servant of the Crown contracting on the part of government is not personally answerable. I am aware that these cases are not in their circumstances precisely similar to the present; and, perhaps in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done; but, in their doctrine, they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which from their very nature would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and, though it is to be presumed that actions improperly brought will fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself."

It is true this was an action of contract; but the reasons given in the judgment apply generally to "an action against a public agent for anything done by him in his public character or employment," and, as it appears to me, apply à fortiori to an action of tort where there is no charge of personal action or personal malice. As many of the earlier authories are cited in this case, I need not refer to them.

*Dawkins* v. *Lord Paulet* (2) was an action for libel brought by an officer in the army against his superior officer, the commander of the brigade, for reports made to the adjutant-general as to the

(1) *Unwin* v. *Walesly*, 1 T. R. 674. (2) Law Rep. 5 Q. B. 94.

conduct and fitness of the plaintiff. To the declaration there was a plea that the defendant made the reports in the course of military duty, and as an act of military duty. To this there was a replication that the libel was written by the defendant of actual malice, without reasonable, probable, or justifiable cause, and not bonâ fide or in the bonâ fide discharge of the defendant's duty. On demurrer to this replication, Mellor and Lush, JJ., stating that the late Mr. Justice Hayes agreed with them, held that the replication was bad, Cockburn, C.J., dissenting: but the Lord Chief Justice agreed "that acts done in the honest exercise of military authority are privileged." (1)

In *Dawkins* v. *Lord Rokeby*,—not the libel case in the House of Lords, which turned upon the privilege of a witness in a military court of inquiry, but at nisi prius (2),—in an action for false imprisonment, malicious prosecution, and conspiracy, Willes, J., held, referring to the well-known case of *Sutton* v. *Johnstone* (3), that a Court of law will not take cognizance of matters of military discipline between military men, and nonsuited the plaintiff.

The publication in the *Gazette* of military appointments, retirements, &c., is an ordinary act of government, and purports so to be in this statement of claim, which, as I have said, alleges no malice, improper motive, or personal act by the defendant, but treats him as acting officially, and sues him as secretary of state for India in council. Indeed, it is only by assuming the *Gazette* to be the official organ of government that the plaintiff can in any way connect the defendant with the alleged libel.

I am of opinion that if, as the last-cited cases shew, the commander-in-chief could not be sued for libel, for an act done in the course of his military duty, the secretary of state is not liable for the publication of an act done in respect to a military officer in pursuance of government orders and regulations applying to military service.

I might decide this point upon the narrower ground that there is no averment that the defendant personally ordered, sanctioned, or knew of the publication in the *Gazette*, and that the statement in the order itself that it is under the authority of government, it

(1) Law Rep. 5 Q. B. at p. 102. (2) 4 F. & F. 806.
(3) 1 T. R. 493, 784.

1877

GRANT v. SECRETARY OF STATE FOR INDIA.

being signed "Commander-in-Chief," is no sufficient allegation that the publication was the act of the defendant; but I prefer deciding it upon the broader ground, as, if I am right as to that, great expense may be saved to the plaintiff. I will add that, if I am right as to the first point, viz. that the act of removal is not within the cognizance of this Court, it seems to me that the publication in the official government record of that act, being obviously necessary for the information of those whom it may concern, is in my judgment also not within the competence of this Court.

I am of opinion that the statement of claim discloses no cause of action, and that the demurrer must be allowed.

*Judgment for the defendant.*

Solicitor for plaintiff: *W. F. Nokes.*
Solicitor for defendant: *H. S. Lawford.*

---

*April* 30

THE OMOA AND CLELAND COAL AND IRON COMPANY *v.* HUNTLEY.

*Shipping—Construction of Charterparty—Liability of Shipowner to Charterers for Negligence of Master and Crew.*

The plaintiffs hired from the defendant a vessel under a charterparty, by which the vessel was let to the plaintiffs for a specified time, and they were to have the whole reach of her holds except what was reserved to the owner for the crew; the crew were to assist in loading and discharging, and the captain was to sign bills of lading and to furnish to the charterers a copy of the log. The defendant engaged and paid the master and crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to the plaintiffs, she and her cargo were lost by the negligence of the master and crew:—

*Held*, that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them.

SPECIAL CASE stated pursuant to a judge's order.

The plaintiffs were a trading company carrying on business in Glasgow. The defendant was the owner of the steamship *Vesper* up to the time of her loss as hereinafter mentioned. On or about the 17th of August, 1875, the defendant chartered the *Vesper* to

the plaintiffs. The charterparty contained, amongst others, the following clauses:—

"The said vessel or steamer being tight, staunch, and strong, and in every way fitted for the voyage or service, and so maintained by owners, with a full complement of officers, seamen, engineers and firemen adapted to a steamer of her class, shall be placed under the direction of the charterer, merchant, or his assigns, to be by him or them employed for the conveyance of lawful merchandise $\frac{\text{and}}{\text{or}}$ passengers as follows—between ports in the U. K. and the Continent, Baltic and Black Sea being excluded between 1st September and 1st March, as may be ordered by the charterers, the cargoes to be laden or discharged in any dock or other safe place the charterers may order.

"The steamer is let for the sole use of the charterers, and for their benefit, for the space of six months, with option of twelve calendar months at charterers' option, commencing from the vessel's being ready at Grangemouth to be at the disposal of the charterers.

"The charterers to have the whole reach of the vessel's holds and usual places of loading, including passengers' accommodation, if any, sufficient room being reserved to the owners for the crew, necessary tackle, apparel, and furniture of the vessel, and she is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel.

"The captain shall use all and every dispatch possible in prosecuting the voyages, and the crew are to render all customary assistance in loading and discharging.

"The captain to sign bills of lading as presented without prejudice to this charterparty, to follow the instructions of the charterers or their assigns or consignees as regards loading, discharging, and departure.

"The coals for the steam-engines shall be supplied by and at the cost of the charterers, as also all port and dock charges, pilotage, and extra labourage that may be required in addition to the crew for loading and discharging, the owners finding all ship's stores, paying crew's wages, and necessary stores for the engine-room, that is, oil, tallow, and waste, also dunnage and insurance on ship.

1877

THE OMOA COAL AND IRON CO. v. HUNTLEY.

"The freight for the hire of the steamer shall be as follows, videlicet—Four hundred and ten pounds per month payable in advance monthly until the vessel is again returned by the charterers, he or they having previously given not less than fourteen days' notice.

"The vessel to be delivered up to the owners, on the termination of this charterparty, at Clyde or Forth. All derelicts and salvages for owners' and charterers' equal benefit.

"The captain to furnish the charterers, their agent or supercargo, when required, a true daily copy of log, and to take every advantage of wind by using sails with a view to economise the expenditure of coal."

The vessel proceeded to Glasgow under the charterparty, and there loaded for Dunkirk a cargo of coals, and on or about the 10th of January, 1876, she sailed for Dunkirk under the charter with the goods on board. In the course of the voyage the vessel was stranded and went to pieces, and the cargo was totally lost. For the purposes of the decision of the special case, it was to be assumed that the loss of the vessel and cargo was caused solely by the negligence of her master and crew.

The plaintiffs contended that on the true construction of the charter the master and crew of the vessel were the servants of the defendant, and that the defendant was liable for the loss caused by their negligence.

The defendant contended that on the true construction of the charter the master and crew were not the servants of the defendant so as to make him liable to the plaintiffs for their negligence, and that he was not liable to the plaintiffs for their negligence.

The question for the opinion of the Court was, which of the contentions was correct.

*C. P. Butt, Q.C.* (*J. C. Mathew* with him), for the plaintiffs, cited *Laugher* v. *Pointer* (1); *Quarman* v. *Burnett* (2); *Fletcher* v. *Braddick* (3); *Fenton* v. *City of Dublin Steam Packet Co.* (4); *Schuster* v. *McKellar.* (5)

(1) 5 B. & C. 547.
(2) 6 M. & W. 499.
(3) 2 B. & P. (N.R.) 182.
(4) 8 A. & E. 835.
(5) 7 E. & B. 704; 26 L. J. (Q.B.) 281.

*Herschell, Q.C.* (*John Edge* with him), for the defendant, cited *Newberry* v. *Colvin* (1); *Sack* v. *Ford* (2); *Sandeman* v. *Scurr* (3); *Rourke* v. *White Moss Colliery Co.* (4)

It was admitted during the argument that the defendant engaged, and in fact paid, the master and crew.

DENMAN, J. I think that the plaintiffs are entitled to our judgment. The defendant engaged, and in fact paid, the master and crew; but it cannot be inferred from the facts before us that he had any reason for supposing them to be unfit to discharge their duties; the question, therefore, turns upon the construction of the charterparty entered into between the plaintiffs and the defendant; and in my opinion, if this document be read as a whole, it really was intended that, so far as concerned the navigation of the vessel, the owner was to retain her under his control for the purpose of carrying out the terms of the contract. It is provided that the *Vesper* "shall be placed under the direction" of the plaintiffs; at first sight this clause appears to favour the contention for the defendant; for it seems to imply that the plaintiffs were to have the sole control of the vessel; but on further consideration it is evident that the clause merely empowers the plaintiffs to determine when she is to sail and between what ports she is to trade. Subsequent clauses provide that part of the vessel is to be reserved to the owner for the crew, that the captain is to use all dispatch, that the crew are to render customary assistance, that the captain is to sign bills of lading, that the coals are to be supplied at the charterers' expense, and that the captain is to furnish the charterers with a copy of the log, and to take every advantage of wind by using sails. These provisions are quite inconsistent with the contention for the defendant, that the navigation of the vessel was to be committed to the control of the plaintiffs; for if the master and crew had been their servants, these stipulations would have been useless. The provision as to the delivery up of the vessel at the termination of the charterparty merely means, that whatever possession of the vessel the

(1) 7 Bing. 190, in Ex. Ch.; sub nom. *Colvin* v. *Newberry*, 1 Cl. & F. 283, at p. 297, per Lord Tenterden, in H. L.

(2) 13 C. B. (N.S.) 90; 32 L. J (C.P.) 12.

(3) Law Rep. 2 Q. B. 86.

(4) Ante, p. 205.

1877

THE OMOA COAL AND IRON CO. v. HUNTLEY.

plaintiffs might take should be relinquished by them within the agreed time at the ports named. Therefore, construing the charterparty as a whole, and giving effect to every part of it, I think that by its terms the owner of the *Vesper* was to supply the master and seamen, and to have, through them, the management of the navigation. The cases cited by the plaintiffs' counsel seem to establish that the master and crew would be held to be the servants of the defendant in actions by third persons, and for the reasons which I have given, I must hold them to be his servants as between him and the plaintiffs. Now a person who contracts to provide workmen or seamen to perform a specified undertaking, is bound to make good any injury which the other party to the contract may sustain from their omission to perform their duty in a proper manner. Here those who were employed by the defendant have, by their negligence, inflicted an injury upon the plaintiffs, who are entitled to recover from him compensation for the loss sustained by them.

LINDLEY, J. I am of the same opinion. The authorities do not throw much light upon the question to be decided; the important matter to be considered is the language of the charterparty. The more the words are studied, the more plain does it become that the *Vesper* was to be navigated by the defendant. In order to ascertain whose servants the captain and crew were, it is only necessary to observe what power the plaintiffs had over them. It appears plain, upon a review of the contents of the charterparty, that, except for certain specified objects, the captain and crew were to remain under the control of the defendant. The plaintiffs might direct where the vessel was to go, and with what she was to be laden, and the charterparty contains certain provisions for the protection of their interests; but the defendant remained in all respects accountable for the manner in which the vessel might be navigated.

*Judgment for the plaintiffs.*

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendant: *Shum, Crossman, & Crossman.*

[IN THE COURT OF APPEAL.]

1877
*June* 2.

TWYCROSS *v.* GRANT AND OTHERS.

*Joint Stock Company — Fraudulent Prospectus — Concealment of Contracts affecting the Company—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38 *— Words "Knowingly Issuing"—Measure of Damages.*

Action brought by the plaintiff under the Companies Act, 1867, s. 38, to recover the amount paid by him on certain shares taken by him in the L. Company on the ground of the fraud of the defendants (promoters of the company), in omitting from the prospectus two contracts entered into by them as promoters—the one a contract between the defendants C. & P. and one S., for the purchase of certain foreign concessions for the construction of tramways which the company was afterwards incorporated to make and work; the other a contract between the defendants, C. & P. and the defendant G., as to certain payments to be made by C. & P. to G. in consideration of his obtaining for them a contract from the company for the construction of the tramways, by means of which fraud the plaintiff had been induced to take the shares, which proved worthless. The jury found that these contracts were material to be made known to the intended shareholders of the company:—

*Held*, by the Common Pleas Division and in the Court of Appeal by Cockburn, C.J., and Brett, L.J., that the contracts ought to have been specified in the prospectus, and that the defendants were liable; Kelly, C.B., and Bramwell, L.J., dissenting:—

*Held*, by the Common Pleas Division and in the Court of Appeal, by Cockburn, C.J., Bramwell and Brett, L.JJ., that the words "knowingly issuing" in s. 38 mean intentionally issuing a prospectus without inserting the contracts which are required by that section to be specified, although they are omitted under the bonâ fide belief that it is unnecessary to specify them.

At the trial the judge directed the jury that if the real damage occasioned to the plaintiff by the defendants' fraud was the price he paid for the shares he was entitled to recover that amount. The jury assessed the damages at the price paid by the plaintiff:—

*Held*, by Cockburn, C.J., Bramwell and Brett, L.JJ., affirming the judgment of the Common Pleas Division that the direction was right, and that the shares taken by the plaintiff being worthless he was entitled to recover the amount paid by him for them: Kelly, C.B., dissenting.

THIS was an action founded upon s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), which enacts that "every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of

1877

TWYCROSS v. GRANT.

such prospectus or notice, whether subject to adoption by the directors of the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

The first count of the declaration (1) stated that the defendants Grant, Clark, & Punchard, were the promoters of a company called The Lisbon Steam Tramways Company, Limited, being a joint-stock company having a capital divided into shares, and duly registered under a memorandum and articles of association under the Companies Acts, 1862 and 1867 (2); and the defendants, being promoters of the company, before the issue of the prospectus and notice hereinafter mentioned, had entered into a contract with each other in the words and figures following, that is to say,

Memorandum of an agreement made the 6th of July, 1871, between Messrs. Edwin Clark, Punchard, & Co., of &c., contractors, of the one part, and Messrs. Grant & Co., of &c., bankers, of the other part, whereby it is agreed as follows:—

1. In consideration of the expenses incurred and to be incurred and the services rendered and to be rendered by Messrs. Grant & Co. in and about the obtaining for the said E. Clark, Punchard, & Co. of a contract upon such terms as shall be satisfactory to the said E. Clark, Punchard, & Co., from the Lisbon Steam Tramways Company for constructing and equipping certain lines of tramways, and also in and about the formation of the said company, and in and about the preparation of and advertising and making public the prospectus of the company, and in using their best endeavours to raise and place the capital thereof, E. Clark, Punchard, & Co. shall pay to Messrs. Grant & Co. the sum hereinafter mentioned at the times and in the manner following, that is to say, the sum of 30,000*l.* in cash out of the first payment which E. Clark, Punchard, & Co. shall receive under or by virtue of the said contract, and the further sum of 10,000*l.* in cash as follows, viz. 5000*l.* out of the second payment and 5000*l.* out of the fourth payment which E. Clark, Punchard, & Co. shall receive under the said contract, as and when received; and the said Clark, Punchard, & Co. shall also pay or hand over to Grant & Co. 5800*l.* in fully paid up shares of that nominal amount, or, at the option of Clark, Punchard, & Co., a similar amount, that is to say, 5800*l.* in cash on the second instalment being paid to Clark, Punchard, & Co., such option to be declared by them within thirty days after the first allotment of shares shall be made by the company.

2. In the event of Clark, Punchard, & Co. being required by the company to

(1) Delivered 5th July, 1875.
(2) 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131.

take any part of the payments to be made to them by the company in respect of the works to be executed by them under their said contract in 8 per cent. debentures of the company, Grant & Co. shall take from Clark, Punchard, & Co. one fourth of any debentures they may be called upon to take instead of cash, at the price of 80*l.* for every 100*l.* debenture.

3. Clark, Punchard, & Co. further agree that, in the event of Grant & Co. declaring within thirty days after the first allotment of shares shall be made by the company that they require Clark, Punchard, & Co. to take up shares in the company to an extent not exceeding 4200 shares in the whole, Clark, Punchard, & Co. will accept a transfer or transfers of such shares as they may be so required to take, and shall pay to Grant & Co. the par value of such shares, that is to say, the sum per share which for the time being shall be called upon the said shares, upon such transfer or transfers being tendered to them duly executed by the transferor or transferors.

4. It is understood that all the shares hereinbefore referred to and which may be taken by the parties hereto shall be held by them respectively, and shall not be dealt with or disposed of until the completion of the contract hereinbefore mentioned. As witness, &c.

And the said Lisbon Steam Tramways Company mentioned in the said contract is the same company as is hereinbefore mentioned; and the defendants, after the making and entering into of such contract, and after the passing of the Companies Act, 1867, and after the 1st of September, 1867, knowingly and fraudulently, and with intent to induce persons to take shares in the said company, and well knowing the premises, issued and caused to be published a prospectus of the said company, and also issued and caused to be published a notice inviting persons to subscribe for shares in the said company, which said prospectus and notice did not nor did either of them specify the dates, and names of the parties to the contract; and the plaintiff, on the faith of such prospectus and notice, respectively, took shares in the company and paid to the company a large sum of money in respect thereof; and the plaintiff had no notice of such contract, there being a contract within the meaning of s. 38 of the Companies Act, 1867; and the said shares were and are of no value to the plaintiff, and he has lost the moneys he so paid to the company as aforesaid.

Second count, that the defendants were the promoters of a company called the Lisbon Steam Tramways Company, Limited, being a joint-stock company having a capital divided into shares and duly registered under a memorandum and articles of association under the Companies Acts, 1862 and 1867; and the defendants

1877

TWYCROSS v. GRANT.

Clark & Punchard, being promoters of the company, before the issue of the prospectus and notice hereinafter mentioned had entered into a contract with His Excellency Field Marshal the Duke de Saldanha, who was a director of the company, and which contract was in the words and figures following,

Memorandum of an agreement made the 5th of July, 1871, between His Excellency Field Marshal the Duke de Saldanha, of the one part, and Messrs. Edwin Clark, Punchard, & Co., of the other part, whereby it is agreed :—

1. The Duke de Saldanha shall transfer and make over to Clark, Punchard, & Co. such part and interest of and in the concessions granted to the Duke de Saldanha by royal decrees of the kingdom of Portugal as enables the Duke de Saldanha to establish, maintain, and work for the term of ninety years from the 15th of May, 1871, railways on the system Larmanjat on the roads from Cascaes to Cintra and Pero Pinheiro, and from Lisbon through Lumiar to Torres Vedras, with all the rights, privileges, and advantages to the said part and interest in the said concession belonging or appertaining, or in any way incident thereto. The Duke de Saldanha shall also transfer and make over to Clark, Punchard, & Co. the existing railway on the road from Lisbon to Lumiar, with all the rolling-stock, materials, implements, and appurtenances thereto belonging.

2. The Duke de Saldanha having made application to the proper authorities in Portugal for the grant of a concession for the like period of ninety years of the right to establish, maintain, and work steam tramways on the road from Lisbon to Cascaes, and having received a formal promise from the minister of public works that the concession so applied for as aforesaid shall be granted to him, hereby agrees to obtain such concession and to transfer and make over the same to Clark, Punchard, & Co. within the space of thirty days from the date hereof.

3. The Duke de Saldanha shall also transfer and make over to Clark, Punchard, & Co., the right and interest of him the Duke de Saldanha of and in the invention of Jean Larmanjat of a new system of mixed railway with a single rail, to such extent as will enable the invention to be used and applied upon the roads mentioned in clause 1 of this agreement, but not further or otherwise.

4. The consideration or price to be paid to the Duke de Saldanha for such transfer as aforesaid shall be the sum of 22,000*l.*, of which the sum of 6000*l.* shall be paid in cash, and the remainder, viz., 16,000*l.*, in fully paid up shares in a company now in course of formation intended to be called the Lisbon Steam Tramways Company, Limited, for the purpose of constructing, maintaining, and working steam tramways or railways upon the roads in Portugal hereinbefore mentioned upon the system Larmanjat.

5. The sum of 6000*l.* so intended to be paid in cash shall become due and be payable to the Duke de Saldanha within three calendar months after the first allotment of shares in the company shall have been duly made to the public and the payment made on such allotment; and the 1600 fully paid up shares representing the remaining 16,000*l.* to be received by the duke shall at the same time be delivered to him or as he may direct.

6. Messrs. Clark, Punchard, & Co. shall hold harmless and indemnify the Duke de Saldanha against all claims and demands of Larmanjat for royalties, dues,

or charges in respect of the use of his invention upon the railways mentioned in clause 1 of this agreement, or in respect of the construction, maintaining, and working thereof.

7. In the event of the capital of the intended company not being subscribed to such an extent as in the opinion of the board of directors thereof, and with the concurrence of Clark, Punchard, & Co. is sufficient to warrant them in proceeding to allot the shares to the public, or in the event of Clark, Punchard, & Co. not obtaining from the company the contract for constructing and equipping the said railways, then and in such case this agreement shall be of no effect, and every clause, matter and thing herein contained shall cease and be void.

8. It is also hereby further agreed that the 1600 fully paid up shares in the Lisbon Steam Tramways Company hereinbefore agreed to be delivered to the Duke de Saldanha shall not be dealt with or disposed of by him, but shall be held until the steam tramways about to be constructed by the company have been completed and opened for traffic. As witness, &c.

And the Lisbon Tramways Company, Limited, mentioned, in the said contract is the same company as is hereinbefore mentioned, and the defendant Grant as well as the defendants Clark & Punchard were before the issuing of the prospectus and notice hereinafter mentioned well aware of the said contract; and the defendants after the making and entering into of the said contract, and after the passing of the Companies Act, 1867, and after the 1st of September, 1867, knowingly and fraudulently, and with intent to induce persons to take shares in the company, issued and caused to be published a prospectus of the company and a notice inviting persons to subscribe for shares in the company, which prospectus and notice did not nor did either of them specify the dates and names of the parties to the contract; and the plaintiff, on the faith of such prospectus and notice respectively, took shares in the company, and paid to the company a large sum of money in respect thereof; and the plaintiff had no notice of such contract, then being a contract within the meaning of the 38th section of the Companies Act, 1867; and the shares were and are of no value to the plaintiff, and he has lost the moneys he so paid to the company. Claim 1000*l.*

The defendant Grant and the defendants Clark & Punchard severally pleaded not guilty and a traverse of every material allegation in the declaration. Issue thereon.

There were eighty-seven other actions brought against the same defendants by other persons who like the plaintiff had been

1877

TWYCROSS v. GRANT.

induced to become purchasers of shares in the Lisbon Steam Tramways Company upon the faith of the prospectus issued by the company. The aggregate amount of the claims in these several actions was about 36,000*l.* In one only of these eighty-seven actions, viz., *Miller* v. *Grant and Others*, had a statement of claim been delivered, which charged fraud at common law as well as under the statute. The others had proceeded no further than writ, when (on the 23rd of February, 1876) the following consent was given by the respective solicitors for the defendants in the eighty-seven actions:—"We do hereby consent that the time limited for the respective plaintiffs in all the above actions to deliver statements of claim be extended until one month after final judgment shall be entered in the action of *Twycross* v. *Grant and Others*. This consent, however, to be without prejudice to any application the defendants may hereafter make, upon reasonable terms, in any one or more of the said actions, to compel the plaintiff or plaintiffs to deliver his or their statement or statements of claim at an earlier date. No order or orders to be drawn up upon this consent, unless required by one of the parties to one of the above actions."

The action came on for trial before Lord Coleridge, C.J., on the 26th and 29th of May, and the 7th, 11th, 12th, and 13th of July, 1876. Before the jury were sworn, the counsel for the defendants applied for a postponement of the trial, on payment of costs, and upon the terms of bringing the amount of damages claimed (1000*l.*) into court, in order to give the defendants an opportunity of entering into negotiations with the Portuguese authorities to obtain further concessions to re-establish the company; or, in the alternative, to allow the defendants to withdraw their pleas. (1)

(1) Order XXIII. under the Judicature Act, 1875, provides that "The plaintiff may, at any time before receipt of the defendant's statement of defence, or, after the receipt thereof, before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may before or at or after the

The application was opposed by the plaintiff's counsel; and Lord Coleridge, C.J., declined to accede to it, on the ground that, this action having been put forward as a sort of test action in order to try the question or one of the questions common to all the eighty-eight actions, the trial of this action, in the preparation for which great expense had necessarily been incurred, must materially affect the trial of the others, and therefore it would be inexpedient in this manner and at this stage of the proceedings to interrupt the ordinary course.

The jury having been sworn, the defendants' counsel formally offered to consent to a verdict for the plaintiff for the amount of the claim in the declaration. This offer being rejected, the case proceeded, the counsel for the defendants intimating to the Court that it was not their intention to appear for their respective clients or take any part in the trial.

The view of the facts taken by the judges respectively is given in detail in their judgments, and this renders a separate statement unnecessary.

At the close of the evidence for the plaintiff his counsel summed up the case. The defendant Grant then, in the absence of his counsel, addressed the jury and contended that there was no evidence to shew that he or his co-defendants had been guilty of any fraud; that the contracts referred to in the declaration were not such "contracts entered into by the company, or the promoters, directors, or trustees thereof," as were required by s. 38 of the Companies Act, 1867, to be disclosed in the prospectus; and that, at all events, the defendants were guilty of no want of bona fides in assuming that they were not such contracts as the Act required to be disclosed.

The defendants Clark & Punchard were not represented. No evidence was offered on the part of the defendants.

---

hearing of the trial, upon such terms as to costs and as to any other action and otherwise as may seem fit, order the action to be discontinued or any part of the alleged cause of complaint to be struck out. The Court or a judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out; but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

1877

TWYCROSS v. GRANT.

Lord Coleridge, C.J., in the course of his summing up observed that it was necessary to determine whether the contracts mentioned in the declaration were contracts entered into by the defendants as promoters, and whether they were intentionally concealed by them when they caused the prospectus to be issued; and he left the following questions to the jury:—

1. Were the contracts so mentioned made by the defendants?

2. Were the defendants promoters of the company at the time of making such contracts and of the issue of the prospectus?

3. Did they issue the prospectus?

4. Did they knowingly omit mention of these contracts from the prospectus?

5. Did the plaintiff take his shares on the faith of the statements in such prospectus?

6. If these contracts had been disclosed in the prospectus, or reference made thereto, would the plaintiff have taken the shares?

7. Had the plaintiff any notice of the existence of such contracts?

8. Were the contracts connected with the affairs of the company, and were they such that they were material to be known to a person about to apply for shares?

9. Did such contracts materially affect the interests of the company?

10. Was it known to the defendants, and was it the fact, that the company, when formed, would bear the burden of the payments to be made under such contracts, and that the sums to be paid under them would come out of the funds of the company?

11. Were such contracts made, and the fact of their existence intentionally suppressed in fraud of the company and of persons invited to take shares in the company?

The jury declined to answer the last question; and they answered the sixth and seventh questions in the negative, and all the others in the affirmative.

At the suggestion of the defendant Grant, Lord Coleridge, C.J., put this further question to the jury,—"Were the statements of the contracts withheld under a bonâ fide belief that by law those contracts need not have been set forth?" To this question the jury answered "Yes."

As to the measure of damages, Lord Coleridge, C.J., told the jury,—"The plaintiff is entitled, if you think there has been fraud, to recover what that fraud has cost him. He is entitled to recover the real damage occasioned by the fraud. If you think the real damage occasioned by the fraud is the full amount of the shares, give him the full amount of the shares, namely, 700*l.* If you think there is evidence which goes to shew that the result of the fraud is not damage to the full extent of 700*l.*, then give him so much less as in your judgment the fraud has really occasioned him loss."

The jury assessed the damages at 700*l.*

A verdict was thereupon entered for the plaintiff for 700*l.*, with leave to move to enter judgment for the defendants on the additional finding of the jury.

July 24, 1876. *Benjamin, Q.C.*, for Grant, moved for a new trial on the ground that the findings on the second and third questions were against evidence. He submitted that the prospectus was issued by the directors of the company, and not by Grant or Clark & Punchard. Assuming that Grant drew it up and caused it to be circulated, still the persons who issue it, within the meaning of s. 38, after the company is formed and organized, are the directors. From that moment, the existence and functions of the promoter are gone. (1) He also moved on the ground that the jury had not been properly instructed, or had misunderstood their instructions, as to the proper principle on which the damages were to be assessed, and that the finding of 700*l.* was in excess of any damages allowed by law.

The rule was refused on the first point, but granted on the second,—the time for appealing against the decision of the Court in refusing to grant a rule for a new trial on the question whether the defendant Grant issued the prospectus, and, if so, whether at a time when he was a promoter, within s. 38 of the Companies Act, 1867, being extended, so as to run only from the date of the final judgment of this Court in the cause. (2)

(1) See 7 & 8 Vict. c. 110, s. 3.

(2) A like rule for extending the time for appealing was obtained in the Court of Appeal on the 2nd of August, 1876.

1877

TWYCROSS v. GRANT.

*Hawkins, Q.C.*, obtained a similar rule on behalf of Clark & Punchard.

*Morgan Howard, Q.C.*, also obtained a rule to extend the time for the plaintiff to move for judgment until the argument of the defendants' rules for a new trial; and that the time for the plaintiff to move for a rule nisi for a new trial, or to set aside the finding of the jury on the question suggested by the defendant Grant, be extended until after the argument of the defendants' rules.

Jan. 23, 1877. *Sir H. James, Q.C., Morgan Howard, Q.C.*, and *H. Tindal Atkinson*, shewed cause against the defendants' rules for a new trial. They contended that the contracts mentioned in the declaration were contracts made by the promoters, which materially affected the interests of the proposed company, and which were required by s. 38 of the Companies Act, 1867, to be disclosed in the prospectus; that these contracts were fraudulently, that is, intentionally concealed; that the evidence shewed that the whole scheme was a fraud, the proposed tramways impracticable, the company a mere sham, the directors the creatures of the promoters, and the means resorted to in order to induce the public to invest their money in the purchase of shares disreputable in the highest degree; that the prospectus was issued without any inquiry by the directors or any one else as to the probability of the scheme being successful: that it was persisted in when the report of the company's own engineer shewed it to be utterly worthless and impracticable; that this was not the case of a contract which could be rescinded on the ground of fraud, the contract to take the shares being with the company, as against whom the plaintiff could not repudiate the shares by reason of such fraud on the part of a promoter,—*Gover's Case* (1); nor could the plaintiff give back the shares to Grant, for Grant made no contract with him; that, but for the concealment of these contracts, the company never would have been floated, and therefore that concealment, for which the defendants were responsible, was the real cause of the damage sustained by the plaintiff; and that the shares never had any real value, and consequently the proper

(1) 1 Ch. D. 182.

measure of damage which the plaintiff was entitled to recover was the amount of money which the defendants' fraud had caused him to part with.

Upon this part of the case the following authorities were cited:— *Hill* v. *Gray* (1), *Borradaile* v. *Brunton* (2), *Powell* v. *Salisbury* (3), *Davis* v. *Garrett* (4), *Lee* v. *Riley* (5), *Hill* v. *Balls* (6), *Mullett* v. *Mason* (7), *Davidson* v. *Tulloch* (8), *Kennedy* v. *Panama and New Zealand, &c., Royal Mail Co.* (9), *Collins* v. *Middle Level Commissioners* (10), *Sneesby* v. *Lancashire and Yorkshire Ry. Co.* (11), and *Smith* v. *Green.* (12)

Jan. 24. *Sir Henry James, Q.C.*, moved pro formâ to enter judgment for the plaintiff; against which

*Benjamin, Q.C.*, and *Cohen, Q.C.*, for the defendant Grant, and *Thesiger, Q.C., C. Bowen*, and *R. E. Webster*, for the defendants Clark & Punchard, shewed cause. There are hardly two judges who have taken the same view of the section in question; but all who have expressed an opinion upon it agree that some limitation must be put upon the words of the enactment. In *Gover's Case* (13), which is the leading authority upon the subject, James, L.J., and Bramwell, J.A., were of opinion that the section does not invalidate contracts such as these, but is confined to contracts made "on behalf of the company," or contracts on which the company may be made liable by adoption or otherwise; and Mellish, L.J., and Brett, J.A., seemed to think that the contracts which are to be disclosed are contracts to the benefit of which the company is entitled, or contracts under which the company may be exposed to some liability beyond that which is expressed in the prospectus. The word "knowingly" in the Act does not mean purposely or designedly, but wilfully and with intent to deceive or mislead. It cannot mean "knowing of the existence of the contract:" it clearly means knowing that it contains something that it was

(1) 1 Stark. 434.
(2) 2 Moo. J. B. 582.
(3) 2 Y. & J. 391.
(4) 6 Bing. 716.
(5) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.
(6) 2 H. & N. 299; 27 L. J. (Ex.) 45.
(7) Law Rep. 1 C. P. 559.
(8) 3 Macq. 783.
(9) Law Rep. 2 Q. B. 580, 587.
(10) Law Rep. 4 C. P. 279.
(11) Law Rep. 9 Q. B. 263.
(12) 1 C. P. D. 92.
(13) 1 Ch. D. 182.

1877

TWYCROSS v. GRANT.

material to be disclosed to the public, and wilfully omitting with intent to conceal it. This the jury expressly declined to find against the defendants. It is not to be lost sight of that this 38th section is found in a division of the statute which is headed "Contracts," and follows a section which deals with how "contracts on behalf of the company" may be made. What more would the plaintiff have had to guide his discretion if the prospectus had contained "the dates of the contracts and the names of the parties to them?" The failure of the scheme was rather to be attributed to the mismanagement or misconduct of the directors in not making themselves acquainted with the difficulties in the way of carrying out the scheme, and in going on with it after they had ascertained that it was impracticable, than to concealment of these contracts.

As to the damages,—The undertaking being according to the plaintiff's own contention utterly impracticable and the shares worthless, he could not have sustained any damage by the concealment of which he complains. He intended to buy shares in a company such as that described in the prospectus, and he bought shares worth less than they would have been worth if the concealed contracts had not been entered into. The utmost measure of damage, therefore, which he could be entitled to, if any, would be the loss which was the natural and necessary result of the defendants' concealment; or the difference between the value of the shares supposing the whole 309,810*l.* were going to be spent on the works, and their value if the capital were reduced by the sums mentioned in the concealed contracts; or the difference in value of the concern when the plaintiff bought his shares, less the sums last mentioned. Where the contract is not rescinded, the person who has been induced by a fraud to enter into it cannot recover as damages more than the difference between the value of the thing he intended to buy and that of the thing which he actually got: Sedgwick on Damages, 7th ed. 591, 592.

[The following cases were also referred to, — *Swinfen* v. *Bacon* (1); *Udell* v. *Atherton* (2); *Chinery* v. *Viall* (3); *Keates* v.

(1) 6 H. & N. 184, 846; 30 L. J. (Ex.) 368.

(2) 7 H. & N. 172; 30 L. J. (Ex.) 337.

(3) 5 H. & N. 288; 29 L. J. (Ex.) 180.

*Cadogan* (1); *Cornell* v. *Hay* (2); *Charlton* v. *Hay* (3); *Venezuela Ry. Co.* v. *Kisch* (4); *Oakes* v. *Turquand* (5); *Peek* v. *Gurney* (6); *Parker* v. *M'Kenna* (7); *Imperial Mercantile Credit Association* v. *Coleman* (8); *Gover's Case* (9); *New Sombrero Phosphate Co.* v. *Erlanger* (10); *Craig* v. *Phillips.* (11)]

1877

TWYCROSS v. GRANT.

Jan. 26. *Sir H. James, Q.C.* (*Morgan Howard, Q.C.*, and *H. T. Atkinson*, with him), in support of the plaintiff's rule for judgment, commented upon the cases cited for the defendants, and referred to the following additional authorities: *Reynell* v. *Sprye* (12); *Smith* v. *Kay* (13); and *Reg.* v. *Prince.* (14)

*Cur. adv. vult.*

Feb. 12. The judgment of the Court (Lord Coleridge, C.J., and Grove and Lindley, JJ.), was delivered by

C. P. D.

Judgment.

LORD COLERIDGE, C.J. This case was tried before me at Guildhall on various days between the 26th of May and the 13th of July in the year 1876. A verdict passed for the plaintiff for 700*l.*; and the jury answered a number of questions, which, as the argument is recent and the facts are fresh in our memory, it is not necessary here to repeat. The plaintiff and defendants alike moved for judgment; and the question on these cross-motions is whether the verdict for 700*l.* can stand altogether or in part.

The plaintiff was an allottee of shares in the Lisbon Tramways Company, of which, for the purposes of this discussion, it must be taken that the defendants were promoters. The defendant Mr. Grant was what is called the financier of the company; the defendants Messrs. Clark & Punchard were the contractors.

It was proved that the contractors had at first agreed to make a line, speaking in round numbers, of 130 miles in length for a sum of 304,000*l.*; but the scheme in this shape and for this number of

(1) 10 C. B. 591.
(2) Law Rep. 8 C. P. 328.
(3) 31 L. T. (N.S.) 437; 23 W. R. 129.
(4) Law Rep. 2 H. L. 99, at p. 120.
(5) Law Rep. 2 H. L. 325.
(6) Law Rep. 6 H. L. 377.
(7) Law Rep. 10 Ch. 96.
(8) Law Rep. 6 H. L. 189.
(9) 1 Ch. D. 182.
(10) 5 Ch. D. 73.
(11) 3 Ch. D. 722.
(12) 21 L. J. (Ch.) 633.
(13) 7 H. L. C. 750; 30 L. J. (Ch.) 45.
(14) Law Rep. 2 C. C. R. 154.

1877

TWYCROSS v. GRANT.

C. P. D.

Judgment.

miles never reached the public. The scheme of which the prospectus was issued, and on the faith of which prospectus the plaintiff bought his shares, was for making a line 68 miles only in length for the sum of 309,000*l.* Substantially, the difference between the smaller contract for the larger number of miles and the larger contract for the smaller number of miles was made up by two sums which the contractors agreed to pay to Mr. Grant and to the Duke of Saldanha, the chairman of the company, respectively, by two contracts the existence of which was not disclosed in the prospectus, and was unknown to the public, and to the plaintiff, as one of the public, when he bought his shares. The plaintiff contends that the withholding of these contracts in the prospectus renders it fraudulent on the part of the defendants as promoters, and entitles him, as a shareholder, to recover from them the money he has lost, viz. the price of the shares, as damages caused to him by the fraudulent prospectus.

Two main questions arise and were discussed in the argument before us,—1. The action being brought distinctly and only upon the 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), does it lie at all? or, in other words, are the contracts set out in the declaration within the words of the statute just mentioned?—2. Were the damages awarded by the jury founded on a wrong principle, and therefore excessive?

The section, the language of which it is necessary carefully to consider, is as follows:—"Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors, or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

Some limitation, it is plain, must be put upon the very general words "any contract," which in their full grammatical sense would

include a contract made by a promoter on his own personal behalf, and without any reference whatever to the affairs of the company. This cannot be the true construction of the statute. What, then, was the object of the statute? because according to that object, if it can be according to legal principles discovered, the language must be interpreted. Now, the general nature of the frauds to which applicants for shares in companies are a prey, and the necessity for special legislation to protect them, will be best understood by examining the respects in which applicants for shares differ from purchasers of other kinds of property, and the dangers to which such applicants are more particularly exposed. All purchasers equally run the risk of buying a comparatively worthless article, and of being misled by untrue representations as to its nature and value; and from risks of this kind no special legislation was necessary to protect shareholders. The value of a share in a company, however, depends not only on those circumstances which regulate the value of all saleable commodities, but also on the persons by whom and the mode in which the capital of the company is to be dealt with. It is utterly immaterial to an ordinary purchaser to know what the vendor will do with the purchase-money when he gets it: the purchaser has no further interest in it. But an applicant for shares in a company is in a totally different position. His money becomes part of the capital of the company; and to him it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps with lavish extravagance, those who have brought the company into existence. Again, it is all important for him to know whether shares applied for by other people are applied for honestly, as by himself, or by persons whose only object is to create a factitious demand for the shares, and to get rid of them as soon as they have succeeded in deluding others to take them on the faith of their apparent value. Now, these are all matters which promoters may arrange for their own benefit, and keep entirely out of sight: and it is notorious that by taking advantage of their opportunities in this respect promoters have committed gigantic frauds.

The investigations which have brought these frauds to light

1877

TWYCROSS v. GRANT.

C. P. D.

Judgment.

have shewn that there are certain methods commonly in use by promoters to induce persons to take shares in worthless schemes, and to supply the means by which promoters can enrich themselves. Some of these methods are the following:—To put forth a prospectus giving a glowing description of the enterprise, omitting everything which if known would shew it to be worthless,—to enter into agreements by which the company should become bound to pay large sums of money to the promoters,—to make arrangements for obtaining the command of a large number of shares in the company, so as to control the disposition and market-price of such shares,—to arrange that the promoters or persons friendly to them should become directors of the company. Of these methods the first was seldom resorted to alone; and, if it were, the law relating to fraudulent prospectuses was sufficient for all practical purposes.

But the frauds perpetrated by means of concealed agreements, which were the most common, were also the most difficult to deal with. Their non-disclosure by no means necessarily made a prospectus fraudulent; and, unless the prospectus was fraudulent, the deluded shareholders were generally without redress. To defeat frauds of this kind some law was required to compel the promoters of companies to disclose all agreements entered into by them, and affecting their own remuneration by the company directly or indirectly, the price to be paid by the company directly or indirectly for the property the company was formed to take, the qualifications or independence of the directors, the issue or control of the shares of the company. Experience shewed that it was by means of secret agreements relating to matters such as these that unscrupulous promoters succeeded in enriching themselves at the expense of their dupes.

In this state of things the 38th section of 30 & 31 Vict. c. 131 was passed. This at least appears from it:—The persons to be protected are persons applying to a company for shares and contributing to its capital on the faith of its prospectus. The means of protection is the compelling those who issue a prospectus to disclose in it the dates and names of parties to all contracts described in the section. The consequence of knowingly omitting to comply with the statute is to render the prospectus fraudulent on the

part of those who issue it, but not on the part of the company itself.

What are the contracts which must be disclosed? Contracts entered into, (*a*) by the company, or the promoters, directors, or trustees of the company, and (*b*) before the issue of the prospectus. The words "whether subject to adoption by the directors or the company, or otherwise," do not explain the *kind* of contract. This is to be ascertained from a consideration of the previous language of the section, and its real object. Some limitation, as has already been said, must be imposed; and it seems clear that the contracts which must be disclosed are contracts calculated to influence persons reading a company's prospectus in making up their minds whether or not they will apply for shares in it. Are there, then, any further limitations to be imposed upon the words describing the contracts to be disclosed?

It is suggested,—first, that only contracts imposing obligations on the company need be disclosed: but so to hold would leave applicants for shares still exposed to most of the frauds already pointed out; and, although all contracts imposing burdens on the company are clearly within the Act, they are not in our opinion by any means all which were contemplated and struck at by it.

The argument derived from s. 37 and the heading "contracts" prefixed to ss. 37 and 38, and to the effect that the contracts in s. 38 must be contracts binding upon the company, is by no means satisfactory or conclusive. Sect. 37 was inserted to cure an oversight in the Companies Act, 1862, and to shew by what contracts companies registered under that Act are to be bound, and is complete in itself. Sect. 38 relates, it is true, to contracts; but its primary object is the prospectus; and it is not confined, at least in terms, to companies formed or registered under the Companies Act, 1862, but extends, at least in words, to all joint-stock companies of whatever description.

It is suggested, secondly, that only contracts entered into by the company or by its promoters, directors, or trustees, *as such*, are within the enactment: and this is the view adopted by Bramwell, B., in *Gover's Case*. (1) But this again would be, in our opinion, too narrow a construction. In fact, nothing would be

(1) 1 Ch. D. 182.

1877

TWYCROSS v. GRANT.

C. P. D.

Judgment.

easier than to evade the Act altogether, if the words "as such" are imported into it. As pointed out by Lord Justice Mellish in *Gover's Case* (1), all that would be necessary to evade the Act would be, to enter into a contract first, and to become a promoter afterwards.

Conceding, therefore, that the contracts to be disclosed must in some way affect the internal or external affairs of the company, including in that expression its property and prospects, the management of its affairs, and dealings with its shares, we think the kind of contract to be disclosed ought not to be limited in the way suggested.

A statute passed to prevent fraud, and couched in general language, ought to be construed so as to defeat all the frauds which are within the mischief sought to be remedied; and the general language of the statute ought not to be cut down so as to leave perhaps the larger portion of such frauds entirely undefeated. It may be inferred that the words of the Act were purposely left as general as possible, in order to throw as wide a protection as possible over those for whose benefit the Act was passed. Nor is it necessary for us to do what the legislature has declined to do, viz. define positively and negatively the exact kind of contract which must be disclosed, and the exact kind of contract which need not. Suffice it to say that any construction of the Act which would exclude from its operation a contract entered into by a promoter before its prospectus was published, and affecting his own payment out of the funds of the company, or the property of the company, or the manipulation of its shares, or the independence of its directors, would be too narrow a construction, and ought not to be adopted.

We have said already that the words "whether subject to adoption by the directors or the company or otherwise" do not appear to us to be so important as the defendants' counsel contended that they were. But we cannot assent to the construction attempted to be put upon them, and to construe "or otherwise" as meaning "or otherwise adopted." Such a construction would make the words themselves almost if not entirely superfluous. It is not easy to suggest how a contract by a promoter on behalf of a

(1) 1 Ch. D. at p. 191.

company before a company existed could be made otherwise than subject to adoption by the company itself,—yet contracts by promoters not subject to such adoption, and concealed from the company, are the commonest and most mischievous form of the frauds which, as we think, the statute was intended to defeat. If we have rightly construed the Act of Parliament, the mere reading of the first contract is sufficient to shew that, if the defendants were promoters, it is clearly one which the Act compels to be disclosed. And, as to the second, it is enough to point to the provision that the Duke de Saldanha is not to receive his money unless the defendants Clark & Punchard obtain the contract for the works. Both parties to this contract had a direct interest in getting up the company altogether irrespective of the probabilities of its ultimate success. We are of opinion that these two contracts are within the words of the section, and that as against the defendants their suppression gave a right of action to the plaintiff on this prospectus, unless we are precluded from so holding by authority, which we proceed to inquire.

*Cornell* v. *Hay* (1), in the Common Pleas, and *Charlton* v. *Hay* (2), in the Queen's Bench, are clearly in accordance with the view above expressed. Lord Chief Justice Cockburn, in *Charlton* v. *Hay*, at nisi prius, is said to have taken a different view of the Act: but there is no authentic report of his observations; and, if he did take the view ascribed to him, and use the expressions which have been quoted to us, he must we think have for the moment overlooked the essential difference between a buyer of ordinary property and a person applying to a company for a share in its capital. Be this, however, as it may, what fell from the Lord Chief Justice at nisi prius cannot in this Court be taken to overrule the decision of the Court in banc.

*Gover's Case* (3), curiously enough, is claimed both by the plaintiff and by the defendant to be conclusive in his favour. The points actually decided in that case were that, even in cases within the enactment, the shareholder could not repudiate his shares. It was also decided by the Lord Justice James and Bramwell, B., that the contract there in question was not within

(1) Law Rep. 8 C. P. 328. (2) 31 L. T. 437.
(3) 1 Ch. D. 182.

1877

TWYCROSS v. GRANT.

C. P. D.

Judgment.

the Act: but the reason for this part of their decision was, that the alleged promoter, Mappin, who made the contract, was not a promoter of the company, or at all events that he was not a promoter, director, or trustee of the company at the time the contract was entered into. This reason, however, was not concurred in by the other members of the Court of Appeal. So far, therefore, as the actual decision in *Gover's Case* (1) is concerned, it does not touch this case; for, we have to consider it upon the assumption that the defendants were promoters when the contracts which we have alluded to were entered into.

The *New Sombrero Phosphate Co.* v. *Erlanger* (2) turned entirely on general principles of equity, not on the section of the statute with which we have to deal: and *Craig* v. *Phillips* (3) only decided that it is not incumbent on a mere vendor of property to a company to disclose what he gave for it. Neither of these decisions in any manner conflicts with the conclusions at which we have arrived. At the same time, it is impossible not to see that the Lord Justice James and Bramwell, B., put upon the Act a construction much narrower than that put upon it by the Court of Queen's Bench in *Charlton* v. *Hay* (4), and by the Court of Common Pleas in *Cornell* v. *Hay* (5), and narrower than that which we have endeavoured to shew is its true construction. But Lord Justice James, and Bramwell, B., do not appear to have decided that the Act does not apply to such contracts as those with which we have here to deal, if entered into by persons who were promoters at the dates of the contracts: and the balance of authority is against such a conclusion. The balance of authority appears to us to be at present in favour of the view that the object of the legislature was, to prevent the concealment of contracts with promoters, &c., which it might be material for applicants for shares to know. The contracts in this case, as we have already said, and the verdict of the jury shew conclusively that if this test is to be applied the contracts ought to have been disclosed in the prospectus.

But then it is urged that this action will not lie against the

(1) 1 Ch. D. 182.
(2) 5 Ch. D. 73.
(3) 3 Ch. D. 722.
(4) 31 L. T. 437.
(5) Law Rep. 8 C. P. 328.

defendant Grant, as he bonâ fide believed that the contracts in question need not by law have been set forth. This bonâ fide belief, however, is perfectly consistent with a full knowledge of all the facts and an erroneous opinion respecting the law applicable to them. As he knew of the prospectus and of the contracts, and as he issued the prospectus knowing that it did not allude to those contracts, the statute applies to him, whether he did or did not take a correct view of the law.

With respect to the damages, we think the verdict ought not to be disturbed. The principle we apprehend to be that the plaintiff is entitled to recover whatever damages he has sustained by reason of the fraud of the defendants. By the fraud of the defendants he was induced to pay 700*l.* for seventy shares in this company, and the whole of that money has been lost. That loss was the natural consequence of the acquisition and retention of shares in such a company as this.

It was indeed contended that 700*l.* could not be right, as the defendants were at all events entitled to be credited with the market-price of the shares when the plaintiff bought them; and reference was made, in support of the defendants' contention on this point, to Sedgwick on Damages, p. 556, and to Lord Campbell's observations in *Davidson* v. *Tulloch.* (1) No doubt, if the shares were really worth anything when bought, the defendants ought to have credit for what they were really worth. But the fact that they were quoted at a premium on the Stock Exchange is only evidence of value, not proof of it; and, if the jury thought (as they well might, and probably did,) that the quotation on the Stock Exchange did not shew a real, but only a delusive value caused by the fraudulent nature of the prospectus and the mode in which the shares were manipulated by the defendants and others in concert with them, the jury were not only justified in disregarding, but were bound to disregard, such delusive and factitious value; although, of course, if the plaintiff had sold his shares, he must have credited the defendants with whatever he might have realized by the sale.

There is no evidence whatever that the shares ever had any value except that which resulted from the wrongful acts of the

(1) 3 Macq. 783, 790.

1877

TWYCROSS v. GRANT.

C. P. D.

Judgment.

defendants; and it would be contrary to all principle to allow them to take advantage of their own wrong, and claim credit for the market-price of the shares, when but for their own concealment of the contracts in question there is no reason to suppose that the shares would have had any market value at all. The defendants are not entitled to say to the plaintiff, "You might have sold your shares to some one as ignorant as yourself, or to some speculator in shares." The plaintiff was not bound to sell; and, after he discovered the fraud, he could not sell.

It was also contended that the property of the company had a value, and that the plaintiff's loss was really attributable to the conduct of the directors in not making the best of that property. But the question is not what was the value of the concessions and plant of the company, but what was the value of the shares got by the plaintiff; and it is evident that the jury treated them as worthless.

It was further contended that, as Grant urged the directors to return the capital to the shareholders when it was intact, he cannot be responsible for its ultimate loss. But he cannot absolve himself from the consequences of his own liability under the statute by shewing that those consequences might have been averted by persons over whom the plaintiff had no control. It was by his fraud that the directors had obtained the command of the capital of the company; and, in acting as they did, they were acting within their powers as conferred by the memorandum and articles of association of the company. Whatever they did acting within their powers was, so far as it affected the plaintiff, a consequence of his having become a shareholder, and a consequence for which the defendants are responsible.

It was further contended that the true measure of damages is, the difference between the value of what the plaintiff intended to get and the value of what he did in fact get. Adopting this principle, two results were contended for. First, it was said that the plaintiff intended to get shares in a company such as that described in the prospectus, and he got shares worth less than they would have been worth if the concealed contracts had not been entered into; and that the utmost measure of damage is, the diminished value of the shares consequent on the payment out of

1877

TWYCROSS v. GRANT.

C. P. D.

Judgment.

the capital of the company of the sums mentioned in the concealed agreements. Secondly, it was argued that as, according to the plaintiff's own contention, the company's undertaking was impracticable, the shares which he really intended to get were worthless, and that consequently he had sustained no damage at all by reason of the concealment of which he complains. But, in our opinion, the defendants are not entitled to avail themselves of the fact that the plaintiff intended to take shares in such a company as that described in the prospectus, or in the company unaffected by the concealed contracts. That intention was itself the result of the wrongful act of the defendants; and, as between the plaintiff and them, he is entitled to repudiate any intention of his own based on their fraudulent concealment. He is entitled to say that, but for their fraud, he would never have parted with his money. He has parted with it for shares as to which there was abundant evidence that they never had any real value at all; and his loss is the direct consequence of the defendants' conduct in issuing the prospectus. His slight and temporary profits hardly equal the ordinary interest of his money; and we think, therefore, there is no reason for disturbing the verdict of the jury either wholly or in part.

For these reasons, our judgment will be for the plaintiff.

*Judgment for the plaintiff.*

The defendants appealed.

May 7, 10, 11, 14, 15, and 17. The defendant Grant appeared in person.

*Thesiger, Q.C.*, and *C. Bowen*, for Clark & Punchard.

*Sir H. James, Q.C., Morgan Howard, Q.C.* (*H. T. Atkinson*, with them), for the plaintiff.

The arguments sufficiently appear in the judgments of the Court. The cases cited were the same as in the Court below.

*Cur. adv. vult.*

June 2. The following judgments were delivered.

C. A.

BRAMWELL, L.J. Matters have been introduced into this case which are wholly irrelevant; matters which have absolutely

Bramwell, L.J.

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

nothing to do with the questions we have to decide. Reluctant as I am to deal with subjects not properly involved in the case in hand, it is nevertheless necessary I should speak of some of the things I have referred to, in order to shew they have no bearing on the questions before us, and in order to shew I am not insensible to their intrinsic importance. I shall speak of the persons concerned as if they were unknown to me by name even, and I speak of the directors with all reserve. They are not before us, and if they were, might very much alter the case suggested against them. The facts before us are these: the Duke de Saldanha, a Portuguese nobleman, ambassador to this country, had a concession of powers to make and work tramways from Lisbon to other places. This concession, from motives of interest, or patriotism, or both, he was desirous of selling to some person or company who would buy it and make and work the tramways. To accomplish this wish he applied to the defendant Grant as a person who would assist him. The defendant Grant applied to the other defendants, Clark & Punchard, contractors, and persons whose business it was to make such tramways. The arrangements come to after various negotiations were as follows: that a company should be formed with a share capital of 200,000*l.*, and a borrowed preferential capital of 150,000*l.*; that Clark & Punchard should contract with this company to make and deliver to it two lines of tramway to Cintra and Torres Vedras in working order, with proper stations and with necessary locomotives and working stock, and with all preliminary expenses paid, for the sum of 309,810*l.* So that the company would have its line in working order, with the necessary plant, and a capital of 40,190*l.* wherewith to work it. Clark & Punchard also were to agree with the company to guarantee two years' interest on the capital. This was to be the agreement with the company when it came into existence, but of this 309,810*l.* Clark & Punchard were to give the duke 22,000*l.* in money and shares, they were to give one Larmanjat, for the right to use his patent, about 7000*l.*, I believe, and they were to give Grant 45,800*l.* for services rendered and to be rendered in and about obtaining for them, Clark & Punchard, a contract "upon such terms as should be satisfactory to them," and in the formation of the company and preparation of, adver-

tising and making public the prospectus, raising and placing the capital. It was also agreed that, if required by Grant within thirty days of the first allotment of shares, Clark & Punchard should take from him not exceeding 4200 shares at par. It is in respect of the not setting forth in the prospectus of these two contracts, viz. the one between Grant and Clark & Punchard, and the other between the duke and Clark & Punchard, and the alleged damage therefrom, that this action is brought. It may be added that Clark & Punchard were to qualify the directors, that is to say, to transfer to them or give them the price of shares free of expense to such an amount as to qualify them to be directors. The cost of this was estimated at 6000*l.* So that Clark & Punchard would pay to the duke, 22,000*l.*; to Larmanjat, 7000*l.*; Grant, 45,800*l.*; in interest, 32,000*l.*; in directors' qualification, 6000*l.*; in all 112,800*l.*, leaving them out of the 309,810*l.* the sum of 197,010*l.*: from this, however, must be deducted what they might lose under their agreement with Grant to take the 4200 shares at par. This loss amounted to 10,000*l.*, leaving therefore net about 187,000*l.* as to costs of the tramways and plant. There is no suggestion that the price paid to the duke was unfair, except this, that the thing turned out worthless, and that no inquiry worth speaking of was made to see if it was worth anything; there is no evidence that the price to be paid to Larmanjat was excessive; as to the 32,000*l.*, the shareholders were told they were to have that amount of interest from the contractors, and therefore, with the least thought, must have known that it came out of their pockets to be returned to them; as to the payment to Grant, he says it was not excessive, and it may not have been, supposing it was right to buy and render such services as he rendered. As to the cost of qualifying the directors, nothing can be said to extenuate it, except that honourable men have been parties to such transactions, though not seeing their, to me, obvious impropriety. The impropriety of being nominees of sellers and at the same time agents of buyers, a thing the impropriety of which I had occasion to point out as long as thirty-five years ago, with a warning that it might bring the parties to it within the law of conspiracy. Still, obvious as it is to people who will reflect on the matter, it seems not to be

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

generally appreciated. But to go on with the narrative. Directors were found, mainly if not wholly I believe by Clark & Punchard, they were qualified subsequently, but they became directors originally, no doubt, with a promise that they should be so qualified, and a knowledge that unless the company was floated, or whatever it may be called, they would not get their qualification. That followed which might be expected. The directors were brought into existence, as such, to enter into a contract for the company prepared ready for their signature. Of course they did that which they were created for, doubtless trusting to their creators that it was "all right." They signed the contract pledging the company to pay Clark & Punchard 309,810*l.*, and they did so, as far as we know, without any inquiry as to how that sum was got at, whether the concession was worth having, what were the prospects of traffic, what was the nature of the country, what was the character of Larmanjat's process. It is idle to talk of the duke's knowledge of his own country, and of the municipal returns. It may be said safely that, as far as we know, the directors omitted to do everything that prudent agents of their principals the vendees, the company, would have done, and which it is difficult to suppose they would have omitted if they had been venturing their own money in the matter. No better proof can be given than that near half the line included in the price 309,810*l.* was abandoned, and a new line substituted wholly different except as to one terminus, Cintra. And this was done at once on the report of Mr. Trevithick, the engineer, who was sent out after instead of before the contract for the 309,810*l.* was signed. No doubt, as Mr. Thesiger said, it does not follow that the original scheme was bad because the second was better; but the abandonment of the first for the second at once on the report of the engineer directly he saw the place, and the terms of the report, are the strongest evidence of the improvidence of the directors and that the first scheme was bad. And, without wishing to promote litigation, I cannot help saying I think they would be in great danger if sued by the company for breach of trust and duty in making the contract they did, and as they made it, and for going on with the scheme, especially in connection with what I am about to state. The defendant Grant

went into the market and bought a large number of shares, and various newspapers were induced, by payments to subordinate persons, to write favourably of the company. The shares rose to a premium; the public were attracted, and subscribed for the capital or a large part of it, both shares and debentures. The defendant Grant attempted to justify giving this false appearance of value to the shares by saying that it continually happens that shares are made to appear worth less than their real value by people selling them when they have not got them. There are two answers to this: first, there is no reason to suppose that any such practice was apprehended by the company; next, that it cannot be right to counteract such a proceeding in the way here adopted; and, indeed, further, if it is believed that a scheme is a good one, and people try to depreciate it by selling its shares, they will be countermined honestly, and not by a trick, by those who think well of it buying the shares so sold. It must not be supposed I think that the defendant Grant is the only one who ever did this, I know it is often done, and is always wrong. To go on, however, the report of the engineer came in. The defendant Grant, creditably to him (indeed it is the only thing I can find in this case to approve of), recommended on the coming in of that report that the scheme should be abandoned; but, if true, marvellous to say, the directors, though they thought it ought to be abandoned, went on with it because there had been dealings on the Stock Exchange which would become null unless a settling day was appointed, and a settling day could not be named unless the directors went on with the scheme. So that for this reason they continued what they believed was likely to turn out ill for the shareholders. It did turn out ill. The tramway was worked for twenty-two months at a loss, then stopped; and an order made for winding-up the company, which stands now in debt on its debentures 150,000*l.*, and with no assets but what its rails and plant may sell for, unless, indeed, its right of action (if any) against its directors may be called assets. I may mention (to shew I have not forgotten it) that when the first route to Cintra was abandoned and a new one substituted, the duke, Larmanjat, Grant, and Clark & Punchard all gave up a part of their expected profits; so that the line, shorter indeed, but more expensive to

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L J.

make, might still be made, with its plant, &c., for the contract price of 309,810*l.* I have stated these facts, but I repeat they are wholly irrelevant. For though the sum to be paid to the duke had been fair, as perhaps it was, and that to Larmanjat, and the sum to be paid to Grant had been 500*l.* only, a bare return for the expense of advertisements, and though he had not been bound to lay out a shilling in raising the price of shares and in bribing the press, if the price to Clark & Punchard had been fair, if the directors had subscribed their own money, if the scheme had been a good one and carefully considered, still, according to the argument for the plaintiff, the contract between Clark & Punchard and the duke, and the contract between Clark & Punchard and Grant to pay him the supposed 500*l.*, ought to have been stated in the prospectus. Nor can it be said it was necessary to shew the actual facts, because if they had been as I have supposed the plaintiff could not have said, as he did, that knowing such reasonable contracts would have prevented him taking the shares, because we have no question before us as to whether he was influenced or not,—that has been found in his favour.

Having finished with what is not relevant, I will now address myself to what is. The first question is, whether the two contracts mentioned in the declaration are contracts within s. 38 of the Companies Act, 1867. The question is the same as to each. If one is within the section and not the other a difficulty might arise. For the plaintiff has sworn and the jury have found, that if the two had been stated, the plaintiff would not have taken his shares, the jury have not found that if either one had been stated he would not. However, in my judgment this is immaterial; as if either contract is within s. 38 so is the other. I will not quote Mr. Buckley's (1) vigorous remark on this section as I do not think it desirable for those who have to administer the law to speak disrespectfully of it, a thing, as Lord Coleridge said, more often done as to Acts of Parliament by those who have not had, than by those who have had to do with the framing of them. But it is admitted on all hands that some limitation must be put on the words of s. 38, and undoubtedly the legislature have imposed a difficult task

(1) Buckley on The Companies Acts, 1862 and 1867, 2nd Ed. p. 482.

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J,

in having to say what, on those who have to administer the law. It is a task very nearly that of legislating. The section in terms comprehends "every contract entered into by the promoters before the issue of the prospectus" without limitation of antecedent time or subject, and would therefore in terms include a contract made twenty years before for taking a dwelling house in which the promoter had lived since. This cannot be; there must be some limitation. Two have been suggested. One by the plaintiff, viz., that every contract is meant which would assist a person in determining whether he would be a shareholder; the other that only those contracts are meant which affect the company, which put an obligation on it, whether with or without some benefit attached. There may be other limitations better than either of them, but I think the choice lies between the two, and I am of opinion that the latter is right. I see no reason for the former. I think it is enough to let the public know on what terms they can have the subject-matter of the scheme they are invited to join. I think that if a mine is offered for purchase it is immaterial when and how the proposed vendor got it. No doubt if he got it cheap it would shew that his vendor had not a high opinion of it, but its intrinsic value would be the same. Such an argument as this would lead to legislation that the prices paid for the last century should be stated. Such a construction of this section would make it a matter of prudence to state every contract that a promoter had at any time been party to. It is true that if a contract obviously immaterial were left out, no jury or tribunal ought to find a shareholder would have been influenced by its being mentioned, but who would risk this? Extravagant cases may be put, but prudence would require that the dates and names of the parties to every contract a man had ever entered into should be stated. I do not want to create a smile, but suppose a director of the company engaged to be married to the daughter of a promoter, and his reason for becoming a director was his wish to stand well with his intended father-in-law. Is the contract of marriage to be stated? If the father has agreed to settle money on his daughter is that to be stated? Why not? A shareholder might truly say, if I had known these things I should have known that the director had a motive for joining the scheme other than his good opinion of

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

it. I trusted to his unbiassed good opinion of it, and took shares accordingly, and would not if I had known of their intended marriage contract, and he might be believed. Suppose a contract by one director to indemnify another perfectly bonâ fide. Is it to be stated? But in like way it might influence intending shareholders. Every sub-contract with Clark & Punchard must be stated; five hundred contracts with workmen and with those who supply materials; so of all sub-contracts by the directors. So of all contracts for advertising, stationery, &c. Take this very case. The plaintiff in his evidence said that the mention of the name of the defendant Grant would have influenced him. A man is not bound to be a shareholder, and if he does not like the information given, need not be. He may ask as he might have asked here, How have you got at the price of 309,810*l.*, and if not answered, or the answer not satisfactory, might have declined the shares. I know that practically this is not done. I think it is better to teach people to look after themselves, and not have this sort of paternal legislation taking care of them and giving them information they will not take the trouble to ask for.

It has been said that to the intending shareholder it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps, with lavish extravagance those who have brought the company into existence. Again, it is all important for him to know whether shares applied for by other people are applied for honestly as by himself, or by persons whose only object is to create a fictitious demand for them, and get rid of them as soon as they have succeeded in deluding others to take them on the faith of their apparent value. I feel bound to notice this on account of its force. But with all submission, are these objects attained by saying that "contracts" shall be stated? To accomplish such objects ought not much more to be enacted? Would it not be necessary not only to state contracts, but anything that had been done by promoters, and persons not promoters? I think so. I construe the section, or endeavour to do so, and not legislate, or as little as possible. The construction I adopt leaves everything affecting the company provided for. Fraudulent statements in

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

the prospectus were before provided against, and if the statements in the prospectus are untrue, and made without adequate inquiry, they would be fraudulent. This enactment guards against knowingly suppressing the truth. If in the contract entered into and stated there had been any breach of duty or trust in the directors; if they had entered recklessly into improvident engagements, as it is said they have here, they are liable to their cestuis que trust and principal, the company; if they have reserved benefits for themselves, they must give them up to the company. For instance, it may be they would be liable for the amount of their qualification which in reality comes out of the contract price.

Then the occasion of this Act must be remembered, viz., the omission from the prospectus of a contract in the Overend & Gurney case which burdened the company. Further, I think this limitation of the enactment is much helped by its words. They are, "Any contract entered into by the company," that must be a contract binding on it; the next words are, "or promoters, directors, or trustees thereof." Surely a contract entered into by trustees must mean as such, and so be a contract binding on the company. A similar observation is nearly as strong as to "directors." Then the only word left is "promoters," and the section can hardly mean contracts other than those they enter into as such; that is to say, binding on the company. That would make the statute speak of one class of contracts as to the company, its directors and trustees, and two classes as to its promoters. The words are in the plural, "promoters," "directors." I do not suggest that a contract intended to bind the company entered into by a single promoter need not be in the prospectus, but the use of the plural helps to shew that the promoters as such were meant. Then the words, "whether subject to adoption by the company or directors, or otherwise," strongly confirms this. I believe they are intended to include contracts binding on the company or contracts which they have power to reject. Some strange remarks have been made about this. The matter is very clear. The company before issuing a prospectus may enter into a contract; that must be stated. Its directors or promoters may enter into a contract after or before it is formed, subject to adoption by the company. Such contracts must be stated. They must be stated, because

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

though not binding at the time of the prospectus, they in all probability will become so by adoption after. The present case may give an illustration. If a prospectus had been issued on the 1st of July of the company it would have been necessary to state the contract of Clark & Punchard to make the line for 309,810*l.*, to which practically Clark & Punchard had bound themselves. Certainly if they had so agreed with the defendant Grant as a trustee for the company, though the company might have refused to adopt that contract. Again, the prospectus is "to be deemed fraudulent on the part of the promoters and directors" (in the plural), "and officers of the company knowingly issuing the same." It is impossible to say that this is levelled at the case of a contract between a promoter and a third person not affecting the same.

The issuing also refers to an act of the company. Suppose one promoter, having given a director his qualification, gave him a prospectus. Could that be deemed an issuing of the prospectus by the promoters, so as to make the issuer of the single prospectus liable to a person who never saw or knew of the particular copy of the prospectus? What I mean is, that the section is speaking of the acts of the company and its promoters as a body, so of its directors and trustees, and refers to contracts presumably within the knowledge of all, which would be contracts binding the company. Then there is the general heading "contracts" before s. 37, which must mean contracts binding on the company. On these grounds I have come to this conclusion. Of course, if the contracts are within the section they ought to have been stated, and if stated and understood must have influenced intending shareholders. As to the authorities, the judgment of Lord Justice Mellish in *Gover's Case* (1) seems to me to be to the same effect. He says, indeed, at page 190, that "the object of the section was to prevent the concealment of contracts which it might be material for applicants of shares to know," but he explains that afterwards: he says that he does not agree with the whole of the reasoning of James, L.J. Now with what part does he differ? He says, "He thinks it too narrow a construction to exclude from the section cases where there was no fiduciary relation at the time of

(1) 1 Ch. D. 182.

the contract, and that it ought to be held to extend to every contract made with a person who afterwards becomes a promoter provided the company have become entitled to the benefit of the contract or liable to perform its provisions." The judgment of James L.J., is also in favour of the conclusion I have come to. The whole tenor of his reasoning is that way, and his opinion is shewn by the passage beginning, "I may illustrate . . ." that shews that in his opinion if the contract bound the company, or they were entitled to the benefit of it, it would be within the statute. The opinion of my Brother Brett is the other way, and so no doubt is that of the late Mr. Justice Honyman, an opinion which I may now say, I value most highly. He had the same point made before him as Mr. Thesiger has made before us, and founded his opinion on the same reasons as my Brother Brett in *Gover's Case.* (1) As for the case of *Charlton* v. *Hay* (2), the best remark to be made on it is that the point made before us was not made there. For some reason, which may be guessed from the shorthand report as read to us by Mr. Thesiger, the case is not reported in the Law Reports or the Law Journal.

This, then, is the opinion I have come to. I do not advance it confidently. I do not think the question admits of a confident opinion, and I think those who express one cannot appreciate the difference between those cases where one may be formed and those where it cannot be. No question of principle, no question to be solved by industry and research exists. The question is, what limitation should be put on an enactment unlimited in words but necessarily requiring a limit in application?

It has been suggested that there is some fiduciary relation between Clark & Punchard or Grant, and the company, which may enable the latter to make some claim on Clark & Punchard, or Grant, or both; and, consequently, that even if only contracts affecting the company ought to be stated in the prospectus, that the contracts in question ought to be. I do not see any such case, certainly not as to the contracts with the duke; and, as if such case existed, the stating of those contracts would be the stating of contracts giving a benefit with no burden to the company, it would be difficult to suppose that the statute meant that the omission of

(1) 1 Ch. D. 182. (2) 31 L. T. (N.S.) 437.

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

such contracts should be deemed fraudulent. If there is anything in this point it was not made at the trial, nor the opinion of the jury taken upon it. The verdict, therefore, could not be returned on this ground, and at the outside there should be a new trial that the plaintiff might make the point.

I do not apologise for this opinion, because I believe it to be the right one. But I am fully aware it is not likely to be the popular one; that would probably be to hold the section wide enough to comprehend these particular defendants and all transactions of a like nature.

I should rejoice if such nefarious transactions could be reached, proved, and prevented. Besides the loss of 350,000*l.* in this particular case, immense mischief has been done by practices such as these. It is the opinion of some of the ablest men of the day that the present stagnation of business is partly attributable to the want of confidence caused by the public knowledge of such cases as that of this company. But as is said in an able pamphlet which has been sent to me, "We must be careful lest righteous indignation against wrong-doers should lead us to throw the net too wide and, so make a snare for the honest and law abiding." I think I have shewn that I have no approval of what has been done in the case of this company. But I must construe the Act as it is, and not as I would have it in this particular case. The wrong-doers, indeed, ought not to escape. They can, in my opinion, be reached in a different way. On the other hand, it is frightful to think of the litigation and ruin there is in store for possibly perfectly honest persons if the construction contended for by the plaintiff is supported. The statute has existed for ten years. Thousands of companies have been formed, and honestly formed, and prospectuses of them issued, in which there has been no mention of contracts not affecting the company. Many of these schemes doubtless have been unsuccessful. When there has been such omission from the prospectus, however honest, the parties to it are subject to actions in which they may indeed succeed, but also may fail.

Supposing that I am wrong, and that the contracts are within s. 38. Other questions arise; they arise on the rules moved for and obtained. There is no other complaint of misdirection,

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

or that the verdict was against evidence, before us. First, I am of opinion that there was evidence that the defendants were promoters, and that they issued the prospectus "knowingly" within the statute. There is nothing to limit the word "promoters" to persons acting before the company is formed. It is not a word of art, it must be understood by lawyers as it would be by laymen. It is impossible to say that the defendants Grant and Clark & Punchard were not promoters of the company, at least till the share capital was engaged. Also, they issued the prospectuses, not any one particular prospectus, indeed, but the whole of them. They were jointly engaged: what the defendant Grant distributed were issued by the others, and so were what Clark & Punchard distributed. Mr. Thesiger admitted that till the case was before us it was never objected that there was no evidence of an issue in fact by Clark & Punchard of the prospectus. Further, "knowingly" does not mean fraudulently. If, therefore, the contracts are within the section, I am of opinion that these points fail the defendants, and that the judgment must stand.

The next question is the question of damages, and I am of opinion that there is not the least ground for a new trial on this head. If irrelevant topics were introduced by the plaintiff on this part of the case, topics equally irrelevant were urged in favour of the defendants. Fault was found with the judge for not assenting to the jury giving the plaintiff a verdict by consent. I think he was right. The very fact the defendants offered it and that the plaintiff objected was enough. It could do the defendants no harm. They could not be worse off than by a verdict against them. The complaint about extra costs is unfounded; I am by no means satisfied that the plaintiff is entitled to those of the trial as he needlessly caused them; and they would have been trifling had not the defendant Grant appeared in the course of the trial. Really the complaint is ludicrous. It is a complaint that the defendants have had an opportunity given them of complaining. They would have been no better off than they are, and would have been this worse off: that they could not have complained. The damages are less than the defendants were willing to agree to. On the question of damages I am of opinion the

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

verdict is right and should stand. The plaintiff's case is that the defendants omitted certain contracts in the prospectuses that they issued; that if those contracts had been in the prospectuses he would not have taken shares. The jury believed this, and I have no doubt the plaintiff believed it, if not as to the contract, with the duke, certainly as to that with the defendant Grant. Of course I do not mean on account of his name. I treat him, as I said before, as a person I never heard of. But if it had been said there was a contract to pay a company-maker 48,500*l.*, to launch, or float, or finance the company—about one seventh of its capital —no one knowing that would have taken shares in it. But this being believed, the consequence follows that through what is deemed fraudulent on the defendant's part the plaintiff has taken shares. Then those shares turning out worthless, the plaintiff's damage is what they cost him. What is the answer to this? First, the argument of the defendant Grant, that if an earthquake had destroyed the line after profitable working for seven years, the plaintiff could not recover the amount he had paid, therefore neither can he now. But in that case the thing would not have been worthless through its intrinsic and inherent defect. Here it is. It is said no, it failed through mismanagement. There is no evidence of this. Then it was argued that as at the outside the contracts with the duke and Grant only amounted to 67,800*l.*, the injury to the company could not be more than that, and so the plaintiff's loss ought to be proportioned in some way. How does that touch the plaintiff's argument, that he would not have subscribed at all, but for the omission of the contracts? A remark of my Brother Brett was decisive. By a fraudulent statement that the takings of a business are 50*l.* a week a man is induced to buy it. It turns out that they are worth only 40*l.* a week, and the business is worse than worthless. But it also appears that if the takings were 50*l.* a week it would be worthless. Would the damages then be nought? The plaintiff says but for your fraud I should not have touched it. Then it was said that the plaintiff had extinguished the concern, or put it to death by petitioning for its winding up. It is wonderful. Any one would suppose that Winding up Acts ought to be entitled, "Acts for the more effectual ruin of companies and waste of their assets." He had a right to

1877

TWYCROSS v. GRANT.

C. A.

Bramwell, L.J.

do what he did. The proper tribunal made the order (not on his petition alone indeed) because it was right to make it, and therefore right to ask for it. And doubtless it was. The line was worked at a loss, and the longer the working the larger the loss. Then it was said that the shares could have been sold for 5*s.*, or 10*s.*, or something, each, and so his loss was not total. I think this was effectually answered by Sir H. James when he said that the plaintiff was not bound to sell his shares, that he had a right to see what the assets would realise. I put, again, the case of a horse fraudulently warranted sound, the seller knowing that it is not. The disease appears, and a man is willing to trust to the recovery of the horse and give 10*l.* for it. The offer is refused, and the horse dies. Are the 10*l.* to be deducted from the price? Impossible. Then it was said there might be some salvage. There was no evidence of any. And when it is remembered that there are preferential creditors to the amount of 150,000*l.*, it is impossible to suppose there will be anything for the shareholders, unless, indeed, the directors should be made to make good to the company the loss consequent on their adopting the scheme, agreeing to pay 309,810*l.*, and carrying it on when of opinion that it was bad—if it should appear that they have failed in their duty to their shareholders in these particulars.

I think I have gone through all the objections. I am of opinion that they all fail, that the right question was left to the jury on this head, and the right verdict found by them.

In the result, I am of opinion that judgment should be entered for the defendants, on the ground that the contracts are not within the statute. But on all other matters I am against the defendants, and think their appeal fails.

Kelly, C.B.

KELLY, C.B. It appears to me upon the most attentive consideration of the numerous and complicated facts, which have been introduced into this case, that the action is altogether misconceived; that the contracts complained of are not within the Act of Parliament, and that the fraud or frauds alleged to have been committed, and of which it may be that there is cogent evidence, are open to a remedy by a bill in equity, or possibly by an action at law, in which it may well be, that Mr. Grant and Messrs.

1877

TWYCROSS v. GRANT.

C. A.

Kelly, C.B.

5 CPD 457

Clark & Punchard, should be made defendants, but which should also include the directors as defendants, and in which ample redress might be obtained. As to the contracts, the suppression of which in the prospectus is complained of, it appears to me, that s. 38 of the Act of 1867, has no application to them whatever; that a contract to be within the provision must have been made with the company, if it has been formed, and if not, with the promoters or the directors, or the trustees, representing or purporting to act on behalf of the future company, and with the intent that the company when formed shall execute a corresponding contract, and so in effect ratify the act done by the promoters, or other body of persons mentioned before its formation; also that it must be such as to impose, or to be intended to impose a burden, or obligation, or a loss, or a liability upon the company, which would affect the value of the shares in the hands of a purchaser.

It seems clear to me likewise, that no contract made between one promoter and another, or by or between any person or persons, and to which neither the company, nor one of the three bodies of persons mentioned in the clause are parties, can be brought within its operation. We must first consider the precise language of the section, and this appears clearly to contemplate that the contracts within it must be such as that the company itself shall become, or is intended to become a party to them, and that if entered into before the formation of the company, it must be made by the promoters, or intended directors, or trustees, as a body, and purporting to represent and to act on behalf of the company to be afterwards formed.

The words of the Act, are, "any contract entered into by a company or the promoters, directors, or trustees thereof." These words obviously apply only to the bodies of persons there mentioned, that is the company itself, or the promoters, or the directors, or the trustees thereof, who may represent the company or enter into any contracts on the company's behalf, and which if entered into before the company is formed are such as that, inasmuch as strictly speaking, the company cannot ratify a previous contract, yet corresponding contracts to the same effect may be afterwards entered into by the company, thus in effect ratifying the act of the promoters or other bodies of persons who had acted for them before

their formation. The clause, therefore, does not refer to contracts by individuals though they may happen to be promoters, or directors, or trustees, the words being, "the promoters, directors, or trustees," in the plural number, without the addition of the words "or any or either of them." It is by such contracts only, that is, contracts entered into by the promoters as a body, or the directors, or the trustees, and to which, or to contracts to the same effect, the company itself afterwards becomes, or is intended to become a party that the company can be in any way bound or subjected to any burden, or loss, or liability, or disadvantage, or the interests, or the value of the undertaking in any way affected, or the shares in the hands of the shareholders become of less value.

We may take the contracts between the company and Clark & Punchard, as an example. If this contract had been entered into between these contractors and the intended directors before the company had been formed, and as it could not be ratified by law by the company after its formation, they had entered into a corresponding contract as they have actually done, with the company, and this contract had been suppressed in the prospectus, it would clearly have been a fraud within the Act of Parliament, as against the publisher of the prospectus: first, as having been a contract within the express words of the statute as made with the company, and having imposed a heavy burden and loss upon the company by their having become liable to pay 309,000*l.* for works and concessions, and preliminary expenses of less value than the sum so payable, if in no other way by the 40,000*l.* contracted to be paid to Mr. Grant, alleged or assumed to be for little or no service or consideration whatsoever. This would have been a contract within the express words of the clause, first, because it would have been made between the contractors, and the intended directors, and afterwards between the contractors and the company itself; and it would have been within the mischief of the statute, because it would have subjected the company to the loss or waste of the 40,000*l.* before-mentioned. But this contract which was a part and a natural part of the real fraud actually committed, was expressly mentioned in the prospectus, and therefore does not bring the case within the Act of Parliament. And when we consider its terms and its full effect in connection with the multifarious

1877

TWYCROSS v. GRANT.

C. A.

Kelly, C.B.

and complicated facts of this case, it becomes obvious that on the one hand if it had been suppressed in the prospectus, it would have been clearly within the Act of Parliament; having been disclosed, it at once opens to us the real fraud, of which it is a part, but a part only, and of which the shareholders complain in this action, and for which an ample remedy would have been found, if the case had been established in a suit in equity.

What then was that fraud? Certainly not the agreement by these contractors to pay the sum of 40,000*l.* to Mr. Grant for little or nothing, and which the contractors alone had to pay, and upon which the company could never, under any circumstances, before or after its formation, become liable, or in any way injured or damnified; but the great and real fraud was the setting up as a body of directors, to whom the whole conduct of the affairs of the company was intrusted, whose qualifications were supplied to them gratuitously, and who regardless of their duties to the shareholders allowed themselves to be persuaded to enter into this contract for the payment of 309,000*l.* of the company's money without inquiry or investigation by engineers, or other competent persons, of the value of the works to be performed, and without the slightest knowledge or attempt to obtain the slightest information as to how this large sum of 309,000*l.* was made up, and consequently without discovering that 40,000*l.* of it was to be paid to Mr. Grant for nothing, or next to nothing.

This fraud, however, this real grievance, upon which all the eloquence and rhetoric of the learned counsel for the plaintiff was expended for days together, is clearly not within the Act of Parliament, because the contract was disclosed in the prospectus. But it is equally clear that if the works were not of the real value put upon them in this contract, and if the whole advantages resulting to the company from the contract were less by 40,000*l.*, or, as the plaintiff contends, by 70,000*l.*, than the price to be paid for them, the shareholders, as the aggrieved parties, would be entitled to complete redress, not by an action like this, but in a suit in equity against the parties, whoever they may have been, who put the directors in motion and conferred upon them the power to enter into this contract, and induced them to enter into it the very day after the formation of the company, and, as before observed,

blindly and without inquiry, or any knowledge or information as to what it was for which they were engaging to pay this large sum of the company's money. And in such a suit the directors themselves must, of course, have been made defendants. But with respect to these contracts between the Duke de Saldanha and the contractors, and the contractors and Mr. Grant, the company were not parties to them and were never intended to be made parties to them, and could not, by any possibility, under any circumstances have become liable to pay a single shilling of the 40,000*l.* payable to Mr. Grant, or the 7000*l.* to Larmanjat, or the 22,000*l.* to the Duke de Saldanha; and, further, if all the money had been paid to the last shilling to the duke and to Mr. Grant, it never could have been recovered back by the company or the shareholders, and the loss, if loss it be, must have fallen upon the contractors, and upon them alone. If the company or the shareholders were indirectly damnified, their remedy must have been sought against the contractors. Whether the company had prospered or failed, whether the contract with Clark & Punchard was a mass of fraud and deception and helped to ruin the company or not, they, the contractors, alone were liable to pay these large sums to Grant and the others, and the company could never have been in any way affected by the payment or non-payment of any one or all of them. If these two contracts should be held to be within this clause of the Act of Parliament, I do not see how any contractors with a company, perhaps, for the construction of a line of railway at an expense of half a million of money, can escape the obligation to disclose in a prospectus, or refer to every sub-contract they may have entered into for any quantity of materials, or of labour, or of anything else connected with their works, because they might have agreed to pay, perhaps, to some favoured relative, an unreasonable or exorbitant sum of money for something purchased of him in order to perform their contract, but which would in effect be a loss to themselves and could not in any way fall upon the company. In what a condition would a fair and honest contractor be placed if this contract with Grant be within the Act of Parliament. A contractor might also be a promoter, and might enter into a sub-contract with another promoter to pay him, in such a case as this, it might be 5000*l.*, for having proceeded

1877

TWYCROSS v. GRANT.

C. A.

Kelly, C.B.

to Portugal accompanied by an engineer, whom he had paid largely for his services, to survey the intended line. This he might honestly believe to be a reasonable sum, and it might really be a reasonable sum, but a jury might find it unreasonable, and perhaps on grounds unknown to the contractor; and upon this the contractor is to be made liable to every shareholder for the entire amount of the purchase-money of the shares and to be stigmatised with fraud, or, in other words, to be exposed to disgrace and ruin. Nor had this agreement for the 40,000*l.* anything to do with the subsequent failure of the undertaking or the ultimate valuelessness of the shares. And it certainly appears to me that nothing but the wide-spread and all-absorbing prejudice against Mr. Grant which seems to have possessed the minds of so many of those who have had to deal with this case could have led to the idea that the engagement for the 40,000*l.*, which was never performed (for a small portion only of the money was paid), had the slightest effect upon the interests of the undertaking, or in any way led or conduced to its subsequent depreciation or ultimate ruin. No doubt the large sums paid to Clark & Punchard may have assisted, together with the general mismanagement of its affairs, arising from the indifference and incompetence of the directors, and the difficulties in the construction of the line, and the selection of sites for the stations, in bringing about the overwhelming embarrassments, and at last the falling to pieces of the company. But I repeat that neither the contract to pay, nor the payment of money by the contractors to Grant, whether known or unknown, had or could have had the slightest effect upon the success or failure of the undertaking. And this is further proved by the fact that the whole sum paid to Clark & Punchard was 213,000*l.*, which left unprovided by the company the whole aggregate of the sums agreed to be paid to the Duke de Saldanha, Larmanjat, and Grant.

This construction of the Act is, as above noticed, supported by the omission of the words "or any or either of them" after the words "promoters, directors, or trustees," which seems to confine the application of the clause to the bodies of persons mentioned, and who would represent the company and contract on its behalf for whatever might be required to be provided before its forma-

tion. So the words "whether subject to adoption by the directors, or the company, or otherwise," seem to imply that the contract is intended ultimately to become the contract of the company.

This view of the section involves the question, whether a contract strictly within its terms as being made by the promoters or the intended directors, and to be afterwards the contract of the company, is still to be disclosed in the prospectus, although it should be in no respect detrimental, but obviously advantageous to the company. Thus, if the promoters had agreed for the purchase of a piece of land for the erection of a station, and the purchase had been made at a sale by auction by the Government, so that no fraudulent excess in the amount of the price to be paid could be suspected, must this contract of purchase have been disclosed?

It is unnecessary, however, to consider this question further, as it has no application to the present case; but, on the other hand, it may be fit and necessary within the Act, that any such contract should be stated, because if made on behalf of the company, and it was ultimately to become the contract of the company, it might be that the price to be paid, or perhaps the purchase of the land itself might be such as to subject the company to a heavy liability, or to the payment of an exorbitant sum of money to some one unduly favoured by the contractors. This question, however, may well be determined, when it shall arise in some case in which the interests of the company are affected by it. I have only, therefore, to observe that I adopt the argument of Mr. Thesiger, that the objects of the statute were to protect the shareholders of the company against some secret contract entered into, as in Overend & Gurney's case, and directly and largely affecting the interests of the company and the value of the undertaking to the company itself, and consequently to the shareholders. And I do not see that the construction which I put upon the Act is substantially at variance with any opinion pronounced, and directly bearing upon the question in this case by any of the judges in *Gover's Case* (1), or in other cases cited. I except, however, the opinion expressed by my Brother Brett (2), and also by the late Mr. Justice Honyman (3), which, although every way entitled to great

(1) 1 Ch. D. 182.

(2) In *Gover's Case*, 1 Ch. D. 182.

(3) In *Cornell* v. *Hay*, Law Rep. 8 C. P. 328.

1877

TWYCROSS v. GRANT.

C. A.

Kelly, C.B.

weight, appear to me to be at variance with the language as well as the spirit of the Act of Parliament.

If, however, this view of the statute be incorrect, I am still of opinion that there ought to be a new trial, by reason of the mode in which the questions supposed to arise were left to the jury. As far as I can collect from the report of the summing up, the learned judge at once declared that in his judgment the contracts were within the words of s. 38, and if that be so, there was no question for the jury upon this point at all, for the suppression of them in the prospectus would at once have constituted the fraud complained of by the plaintiff. But the jury were asked whether it was important to have these contracts disclosed to the public, and whether they were material to be communicated to the public or to the purchasers of shares. Now I must say that these questions appear to me to be far too vague and undeterminate in their effect to be left to a jury in a case like this. The statute contains no guide or indication upon which a jury can arrive at any intelligible, and reasonable principle of construction, and if any test is to be applied of the importance or the materiality of the disclosure of the contracts, it must be surely the question whether the effect of the contracts is substantially detrimental to the company, and such as to impose upon them some burden or liability directly affecting the value of the shares in the hands of the shareholders. Again, the plaintiff was asked whether, if he had known of these contracts, he would have become the purchaser of the shares. Surely this is no criterion upon which the decision of such a case can by law depend. The plaintiff might have sworn, and truly sworn, that he would not have become a shareholder if he had known that Mr. Grant had anything to do with the formation of the company, and yet his interposition in its formation might have been in every way advantageous to the company, and have enhanced the value of the shares. And whichever way all or either of these questions might have been answered by the jury, the company might have been benefited and not injured by the contracts in question, and the value of the shares increased and not diminished; and yet a jury might think it material or important that they should have been made known, and the plaintiff might have refused to purchase the shares, if the contracts had been disclosed.

I pursue this part of the case no further, and proceed, I hope briefly, to consider the question of damages. Upon this point it is difficult to deal with the evidence at one view, and to determine whether or not there has been a miscarriage of justice in the verdict delivered. Let me consider, first, what the case for the plaintiff really was, and what evidence he was bound to lay before the jury in order to entitle himself to a verdict with damages.

Assuming that the suppression of the contracts in the prospectus was fraudulent as against the defendants, and that the plaintiff was induced by his ignorance of the existence of these contracts to become a purchaser of the shares, it was still incumbent upon him to prove that the shares were of less value to him than the sum of money which he paid for them, and as the verdict is for the entire sum, he was bound to prove that they were of no value at all. The circumstances of this case are, however, peculiar, because it is left in uncertainty at what time the plaintiff was first aware of the existence of these contracts, and it is the value of the shares at that time, or the difference between the value or price which he could then have obtained for them, and the price that he paid, that he is entitled to recover in this action.

Now it appears to me that it was for the plaintiff to prove, and to prove distinctly and expressly, the time when the existence of these contracts became known to him, because it was then, and I agree it was not before that he became entitled to maintain the action. I see no difference between this case and the case hypothetically put during the argument that the plaintiff had become the purchaser of a picture falsely represented to be a Vandyke, and that he afterwards discovers that it is not an original but a copy. He is then entitled to maintain his action, and if the circumstances of the case be such as that he can restore the picture to the seller he is entitled to deliver back the picture, to rescind the contract, and to recover the entire price which he has paid. But if he think fit to retain the picture, he can recover only the difference between the price he has paid and the value of the picture when his right of action accrues. In this case it was, I think, incumbent upon the plaintiff to prove first that he purchased the shares at the price of 700*l.* I agree that he was not bound to sell the shares at the time of the purchase, or at any

1877

TWYCROSS v. GRANT.

C. A.

Kelly, C.B.

time afterwards, until the suppression of these contracts became known to him; and therefore I do not agree with Mr. Thesiger that the right of the plaintiff is limited to the difference between the price paid for the shares, and the value of the shares either at the time of the purchase, or at any given time afterwards until he became acquainted with the suppression; but it was for him to shew what and when that time was; and this he failed to shew distinctly, but left it in uncertainty; for while he said in general terms that he knew of the contracts only at the time of or after the petition, his solicitor who presented the petition swore that he presented and conducted it from information received, as well before as after it was presented. And it was further proved that the shares were quoted on the Stock Exchange at from 15*s.* to 25*s.* a share, that is at the intermediate price of 1*l.*, as late as the month of March next after the month of November in which the petition was presented. Unfortunately the witness, who was the plaintiff's witness, came unprovided with the price of the shares in 1874, or particularly in the month of November in that year; but as they declined for nearly the last year before the month of March, 1875, when they were at 1*l.* per share, they must have been at a higher price when the petition was presented in November. Under these circumstances I consider that the attention of the jury ought to have been distinctly called to all this evidence, and it should have been put to them pointedly to find the time when the plaintiff first knew of the contracts, and then to find the price, which could have been obtained in the market for the shares; because that price, whatever it might have been, should have been deducted from the 700*l.*, the entire price of the shares to the plaintiff, for which entire sum he has obtained the verdict. Whereas I find that the case was thus left: "On this matter of the damage I leave the question to you thus: The plaintiff is entitled, if you think there has been fraud, to what that fraud has cost him; the real damage occasioned by the fraud. If you think the real damage occasioned by the fraud is the full amount of the shares, give him the full amount of the shares, 700*l.* If you think there is evidence in this case to shew, that the amount of fraud is not to the extent of 700*l.*, then give him as much less as you think in your judgment the fraud has really occasioned him loss."

Thus the jury were left with this vague and general direction, instead of being told expressly that they were to compare the whole sum paid for the shares with what the shares would have produced, if sold when the plaintiff first knew of the suppression. In any case I think this charge would have been unsatisfactory; but when we remember the cause was tried as undefended, that the defendants had no counsel to cross-examine the witnesses, or request the attention of the judge to the particular evidence above adverted to, it seems to me impossible to hold that this verdict was satisfactory. And this brings me to the cause of the case being undefended. The rule for a new trial does not specify the refusal of the judge to allow the defendants to submit to a verdict for the damages claimed, and the costs, and to suffer judgment for all that the plaintiff demanded, or could or desired to recover, as one of the grounds of the motion for a new trial. But still the case was tried against the will and notwithstanding the protest of the defendants; and the plaintiff's case during nine days was conducted by some of the ablest counsel at the bar, and unopposed, and all this at the cost of the defendants, and with the prejudice necessarily created in the minds of the jury by the defendants having withdrawn from the defence of the case; and the plaintiff's case being urged upon them with all the power and eloquence of his counsel as a case of atrocious and unparalleled fraud. Thus too the evidence that the petition, which in effect put an end to the existence of the company, and rendered the shares unsaleable in the market, and at last reduced their value to nothing, was the act of the plaintiff himself, was altogether disregarded and unnoticed; and upon these grounds I think, that as respects Mr. Grant, there ought to be a new trial.

It also appears to me that there was no evidence to go to the jury of the issuing or publishing the prospectus by the defendants Clark & Punchard. They had sworn, I believe, in answer to interrogatories: "The prospectus was not issued by or by the direction or authority of us or either of us." "We believe we or one of us had seen it, and Mr. Punchard, as contractor, was one of those present at a board meeting at which it was discussed. But save as aforesaid it was not issued with the sanction of us, or either of us, nor was our sanction required." All that I can find

1877

TWYCROSS v. GRANT.

C. A.

Kelly, C.B.

directly to the point is that Mr. Keith being asked by Sir H. James, "To this meeting was a proof of the prospectus brought?" Answer: "It was." Question: "By whom?" Answer: "I believe by the secretary. There was only one copy, and I am not aware how it came to the office." Question: "Was it brought by Mr. Morgan?" Answer: "Either by Mr. Morgan or Mr. Punchard." Surely this is no evidence against the one or the other. If it was brought by Mr. Morgan, who had certainly acted as the solicitor of Clark & Punchard, yet he was also the solicitor of others of the company, and although the solicitor of Clark & Punchard, still there was no evidence that they or either of them had authorized him to deliver the prospectus.

The remaining evidence is simply that it appears in a letter that Grant transmitted a number of those prospectuses to Clark & Punchard, and requested them to distribute them; but there was no evidence that they did in fact distribute a single prospectus. On this ground I think if it stood alone, that there ought to be a new trial.

I am therefore of opinion that the verdict should be entered for the defendants upon the ground that the contracts are not within the Act, or that there should be a new trial, and without payment of costs.

Cockburn, C.J.

5 C.P.D. 465

COCKBURN, C.J. This was an action brought by the plaintiff, upon s. 38 of the Joint Stock Companies Act of 1867 (30 & 31 Vict. c. 131), to recover the amount paid by him on seventy shares, of 10*l.* each, in a joint stock company, called the "Lisbon Steam Tramways Company," on the ground of the fraud of the defendants, within the meaning of that enactment, in omitting from the prospectus of the company, issued, as was alleged, by them as promoters, two contracts entered into by them, also, as was alleged, as promoters—the one a contract between the defendants Clark & Punchard, and the Duke de Saldanha, the proprietor of certain concessions which the company was formed to work; the other a contract between Clark & Punchard and the defendant Grant, as to certain payments to be made by Clark & Punchard to Grant, in consideration of his obtaining for them a contract from the company for the construction of the tramways—

by means of which fraud the plaintiff had been induced to apply for and take the shares in question, which had proved worthless.

The cause came on for trial before the Lord Chief Justice of the Common Pleas Division and a special jury, at Guildhall, when evidence was given to the following effect:—

In 1871, the Duke de Saldanha, then being the representative of Portugal in this country, had obtained concessions from the Portuguese government for making steam tramways, according to the patent of a Monsieur Larmanjat, on the public roads between Lisbon and Cintra, with an extension from Cintra to Pero Pinheiro, and between Lisbon and Torres Vedras, and thence on to Leiria—the whole (with the necessary sidings) being a distance of about 120 miles—and had completed a distance of about four miles between Lisbon and Lumiar, on the way to Torres Vedras. Being without the necessary capital to give further effect to the concessions, it occurred to him to form an English joint stock company, to which the concessions should be made over, on their paying him a certain sum in cash, and a further consideration in shares.

With this view he entered into communication with the defendant, Mr. Grant, and the terms on which the concessions should be assigned were arranged between them. But Grant, not being willing, as it seems, to appear as taking part in the transaction, instead of himself purchasing the concessions, and disposing of them to a company, entered into communication with the defendants, Clark & Punchard, who are railway contractors, and proposed to them to purchase the concessions, and make them over to a company which he undertook to form; stipulating however, that, if he should succeed in obtaining a contract for the construction of the work, which should be satisfactory to Clark & Punchard, they should pay him 40,000*l.* in cash, and 5800*l.* in fully paid-up shares, or cash at their option. The contractors were further to find a sum of 6000*l.*, for the purpose of qualifying the directors, which Grant was in the first instance to pay, which, with the 45,800*l.*, would make, in round numbers, a sum of 52,000*l.* This amount was to be covertly included in the price to be obtained by Clark & Punchard from the company.

Besides this, Clark & Punchard undertook to take, if required by Grant so to do within thirty days after the allotment of shares,

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

4200 shares from Grant at par—the purpose of this apparently mysterious stipulation being beyond doubt to enable the defendant Grant to buy shares in the stock market at a premium, with the view of giving to the shares a fictitious value when the undertaking should be presented to the public, with no greater possible loss to himself than the difference between the amount of such premium and the par price of the shares, while if the shares should rise to a premium, the profit would be his.

These terms having been agreed on between Grant and Clark & Punchard, it was arranged with the Duke de Saldanha that Clark & Punchard should purchase the concessions, to be by them made over to the company to be formed. This done, the defendants set to work to form the company.

In the meantime Clark & Punchard—treating Grant as representing the future company—sent in to him a tender on the 2nd of June, which, however, had reference to the cost of the works and rolling stock alone, and did not include the payments to be made by them to Grant. In this tender they estimate the cost of laying down the tramways upon 120 miles including sidings—the distance at that time contemplated—at 171,000*l.*, being at the rate of 1425*l.* per mile; that of finding rolling stock at 74,968*l.*; and that of doing the necessary work on the stations at 26,000*l.*—making in all 271,968*l.*

On the 12th of June, Clark & Punchard sent in another tender, not addressed to Mr. Grant, but, by anticipation, to the directors of the company—at this time no directors had been appointed, nor was the company as yet in existence—in which the proposed price was raised to 307,600*l.* In the contract actually executed between them and the company the sum was slightly raised, and fixed at 309,810*l.*

By the beginning of July the company was provisionally formed. Articles of association were executed on the 6th of July, and registered on the same day, the company then consisting of seven persons, each taking one share; and a board of six directors having been provided by the defendants, besides the Duke de Saldanha, who was to be the chairman, the board was appointed accordingly by the seven shareholders on the same day, after which the directors proceeded to appoint the officers of the company.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

It now becomes necessary to advert to the contracts in respect of which the charge of fraud is preferred. On the 5th of July, the day previous to the registration of the company, a contract had been executed between the Duke de Saldanha and Clark & Punchard, whereby the duke assigned to them his interest in the concessions, together with his right to use Larmanjat's invention, for 22,000*l.*—6000*l.* in cash, to be paid within three calendar months after the first allotment of shares and payment made thereon, and 16,000*l.* in paid-up shares in the company. If, however, a sufficient amount of capital should not be subscribed to warrant the issuing of shares, or if Clark & Punchard should fail to obtain the contract for constructing and equipping the lines, the agreement was to be void. At the same time a subsidiary contract was made with Larmanjat by Clark & Punchard, whereby Larmanjat was to accept from them a fixed sum of 7000*l.*, instead of the royalties he was to have received under his contract with the duke.

On the ensuing day, the 6th, a contract was executed between Grant and Clark & Punchard, embodying the terms previously agreed upon between them, and which have already been stated.

A contract, of the same date, between Clark & Punchard and the company, was adopted by the directors at a meeting held on the next day, the 7th, and was duly executed. By this instrument Clark & Punchard assign the concessions to the company, and undertake the construction of the tramways, according to the plans and specifications, for the sum of 309,810*l.*, to be paid as follows: 75,000*l.* after the first payment on the shares, and, thenceforward, 14,000*l.* on the 1st of every month, subject, however, to the condition that after 190,000*l.* should have been paid in cash, the rest, if the company so required, should be taken in debentures of the company bearing interest at 8 per cent. But here a remarkable circumstance presents itself. In the plans and specifications attached to this contract the line from Torres Vedras to Leiria was omitted, that part of the projected line being abandoned altogether; and the mileage was thereby reduced from 120 to 68 miles, while the number of stations was reduced from eight to five. Yet the price to be paid to the contractors was slightly increased instead of being rateably diminished. No explanatio

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

of this singular fact has been offered. It does not seem to me unreasonable to infer that the reduction was found necessary in order to enable the contractors to meet the heavy amount which they were called upon to pay in cash or shares to the Duke de Saldanha and Mr. Grant. These, as we have seen, amounted in the whole to 74,000*l.*—22,000*l.* to the duke, and 52,000*l.* (in round numbers) to Mr. Grant. A reduction of 52 miles—the difference between the lines contemplated in the tenders and the 68 miles to be laid down under the contract—at the rate of 1425*l.* a mile—the estimated cost of Clark & Punchard for the execution of the work—comes exactly to 74,000*l.*, the identical amount so to be paid. The coincidence, to say the least of it, is a very striking one.

By the terms of this contract, it should be further observed, the entire line was to be completed by the 31st of December, 1872, the contractors agreeing to pay 7 per cent. interest on the paid-up capital of the company in the meantime.

The adoption of this contract appears to have been taken as a matter of course. It was brought before the directors, not in draft, or for consideration, but ready prepared for execution. No inquiry had been made on behalf of the company as to the charge proposed for the execution of the work. No engineer had up to that time been consulted. The terms had been arranged between the contractors and Mr. Grant, and this appears to have been considered sufficient. No estimate appears to have been submitted to the directors; the previous tender of the contractors does not appear to have been brought before them; nor do they appear to have been aware of the reduction of the mileage.

At this second meeting of the directors, held, as I have just said, on the 7th of July, the contract with Clark & Punchard having been adopted, the proposed prospectus was taken into consideration. It had been prepared by the defendant Grant, in communication with Clark & Punchard; and the original draft, partly printed and partly altered in manuscript, which was produced on the trial, bears marks of extreme haste. It contains very numerous alterations, interlineations, and passages expunged, in the handwriting of Mr. Maurice Grant, the defendant's manager. In this state, there not being time to make a fair copy, it was

brought to the board, either by the defendant Punchard or his solicitor, Mr. Morgan, who the day before had been appointed solicitor to the company—both appear to have attended on that day—and was adopted by the directors, and ordered to be advertised and published.

That Grant and Clark & Punchard were acting in concert in the preparation of the prospectus is manifested by a particular circumstance. In the draft prospectus, as originally printed, there appeared a passage stating that there was "every probability of dividends ranging between 15 and 25 per cent. per annum." This passage had been struck out by Mr. Grant on revising the draft. But the draft as revised having been sent to Clark & Punchard for approval, Punchard wrote against the expunged passage the words, "Stet. C. P. & Co." In a letter from Mr. Grant to Punchard of the 8th of July, he writes, "On second thoughts, after I sent up to you yesterday, I did not think it prudent to vary the prospectus as to estimate of traffic, and consequently did not use the power you gave me to do so."

In the prospectus as adopted the lines of tramway to be laid down are specified, and shewn to extend to about 68 miles—from Lisbon to Torres Vedras 35 miles; from Lisbon to Cascaes 17 miles; from Cascaes to Cintra 9 miles; and from Cintra to Pero Pinheiro 7 miles. The contract with Clark, Punchard, & Co. is referred to as having been made for "the construction of the lines, erection of stations, and a complete equipment of rolling stock, for the sum of 309,810*l.*, payable as to 190,000*l.* in cash, and the balance in cash or debentures at the the option of the company." After which follow these words: "This sum includes the acquisition of the concessions, and the license of the patent rights;" to which, in the original draft, was added, in the handwriting of Mr. Grant, "and also all payments incidental to the formation of the company." But, except so far as they may have been meant to be included in the last-mentioned words, there is no reference in this document to the pecuniary arrangements entered into between Clark & Punchard and the duke, or between Clark & Punchard and Grant, still less any such reference to the contracts between these parties as is required by s. 38 of the Companies Act of 1867, supposing these contracts to be within that section.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

There is no ground for believing that the directors were at this time aware of the secret contract between Clark & Punchard and Grant. They must, of course, have been aware that there had been a contract between Clark & Punchard and the duke, whereby Clark & Punchard had acquired the concessions; but, with the exception of the duke himself, it is quite possible that all may have been unacquainted with the terms of the bargain. There is every reason to think that all parties believed that the undertaking was a genuine one, and likely to be successful. It is probable that the Duke de Saldanha took the sanguine view of the undertaking which a man deeply interested in a given result is apt to take, and inspired his colleagues with equal, and equally mistaken, confidence. The prospectus was issued with great precipitation, and the project offered to the public, and the shares allotted, before the line had been duly surveyed, or even inspected, on behalf either of the company or the contractors. In the result, after the company had been completely formed and the shares paid for, the line from Lisbon to Cintra, as originally proposed in the prospectus, had to be abandoned for another route, and the branch from Cintra to Pero Pinheiro was given up altogether. The only misgiving which, according to Mr. Keith, the secretary, appears to have occurred to the directors, was as to the sufficiency of the capital of the company. That that misgiving would have been strengthened had they been made aware of the arrangement by which upwards of 50,000*l.*, supposed to be part of the amount to be paid to the contractors for constructing the line, was to go to Mr. Grant, may readily be assumed. But for the blind faith which the directors appear to have placed in those with whom they were dealing and the haste with which the business was conducted, the directors might have been struck with the reduction of the mileage to the extent of one-half from that of the tender, with no corresponding reduction of cost—that is if they had inquired, as they should have done, if any tender had been made—and might have instituted inquiries which would have brought this part of the transaction to light.

The issuing of the prospectuses having been ordered by the directors, the draft was delivered to Mr. Grant, for the purpose of having it printed and published in the usual manner, this part of

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

the business being left entirely to him; and this he accordingly did. In the meantime he had carried on certain operations on the Stock Exchange, the effect of which was to give a fictitious value to the shares about to be issued. Applications for shares came in abundantly; upwards of 35,000 were applied for. The applications were referred to Mr. Grant, who decided to whom shares should be allotted. The allotment commenced on the 1st of August. The whole number was speedily taken up, and the company was formed. The borrowing power was exercised, and 50,000*l.* was raised on debentures of the company.

In the meantime, Mr. Trevithick, who had been appointed engineer to the company, had gone out to Portugal to survey the lines, and the report made by him, bearing date the 21st of August, at once shewed the impracticability of the scheme, as proposed in the prospectus. He had found the line from Lisbon to Cascaes, and thence to Cintra, impracticable, except at a greatly increased expense, owing to the exceptional steepness of the gradients, which would render considerable detours necessary, and to the narrowness of the road in places, which would have to be widened. He also found that under the existing concession, the line could only be commenced from Belem, a suburb distant a mile and a half from the entrance to Lisbon itself.

On the receipt of this report, Mr. Grant, foreseeing, no doubt, the disturbance which would ensue if the project should be persevered in under the certainty of failure, proposed to Clark & Punchard at once to give up the undertaking, and to return their money to the shareholders, which might then have been effected at the loss of a few thousand pounds. Concurring in this view, Clark & Punchard, at the suggestion of Grant, who was absent from town, urged this course on the directors, who it appears would have assented to it, but for the remonstrance of the company's brokers, who represented that as there had been dealings in the shares on the Stock Exchange, it was absolutely necessary that the company should go on and a settling day be appointed. The directors, perhaps not altogether uninfluenced by an unwillingness to give up the concern, unfortunately yielded to this representation, and the company was kept alive, only to come to a more distressing end at a later period.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

And now a most material change, so far as Cintra was concerned, was introduced into the scheme, probably at the suggestion of the engineer. The line from Lisbon to Cascaes, along the right bank of the Tagus, and from Cascaes to Cintra, was abandoned, and a new line direct from Lisbon, across the country to Cintra, substituted for it, whereby the distance was reduced from 25 or 26 miles to 16; besides which, the branch from Cintra to Pero Pinheiro was wholly given up, still further lessening the mileage by 7 miles; thus reducing the 68 miles of the prospectus to 51 or 52. Yet, though by this change the difficulties of the original line were avoided, and the distance materially dimished, it was found necessary, in order to obtain means to construct the line as thus altered, to find further capital to the extent of 40,000*l.* This, as the whole of the share capital of the company had been raised, and it was probably deemed unwise to have further recourse to the borrowing power, was effected by an agreement of the 20th of September, whereby the duke relinquished in favour of the contractors 11,000*l.* of the amount he was to have received; Larmanjat, 3000*l.*; Grant, 17,500*l.*; but the last with an increase of the amount to be paid to him in shares to 11,000*l.*; while the contractors themselves made up the rest. No notification of this important modification of the original scheme was made to the shareholders till the 25th of June, 1872, when the directors in transmitting to them the warrants for interest due on the 1st of July, informed them that the directors had been enabled "immediately after the formation of the company, through the assistance of the Duke of Saldanha, in obtaining a further concession, to adopt a direct road to Cintra, in lieu of the more circuitous and inconvenient road first proposed, and thus to prevent all possibility of competition by the shorter route." No steps were taken to obtain the assent of the shareholders to this important change.

The lines from Lisbon to Torres Vedras, and from Lisbon to Cintra, as thus finally settled, were not begun for some months, and were not completed till July, 1873, instead of by the 31st of December, 1872, as stipulated for by the contract. Notwithstanding this delay the periodical payments were regularly made to the contractors, as though the work had been carried on and executed

as required by the contract. The entire cost appears to have amounted to 254,050*l.* The lines having been completed and worked for a period of sixteen months, it was found that, the traffic proving less than had been expected, instead of a profit being realised, a loss of 6000*l.* had taken place on the working of the lines during that time. The gross takings during these sixteen months had been 10,439*l.* the expenditure 16,462*l.* In the meantime no payments had been made on the debentures; and the interest due to the share and debenture holders, already amounting to 12,000*l.*, was, of course, accumulating. On the other hand, there appeared to be nothing to lead to any reasonable expectation either of the traffic increasing or of the expenses of working the lines being capable of being diminished. Under these circumstances, on the 1st of December, 1874, the plaintiff presented a petition for winding-up the company, and an order was made thereupon, after full inquiry and discussion, on the 16th of July following. We must take it, therefore, that the judge was satisfied that all hope of working the lines with success was at an end. No evidence is before us to shew that the lines were not properly constructed or efficiently worked. The failure of the undertaking appears to have arisen solely from the insufficiency of the traffic to afford a remunerative return on the outlay expended. In the course of the proceedings on the petition the plaintiff became aware of the contracts between Clark & Punchard and the Duke of Saldanha, and between Clark & Punchard and the defendant Grant, whereupon the present action was brought.

On these facts the learned judge left to the jury as the two main issues in the cause whether the contracts in question materially affected the interests of the company and were material to have been made known to the shareholders, and whether the prospectus had been issued by the defendants as promoters. The jury, on questions specifically put to them, found that the defendants were promoters of the company at the time the contracts in question were entered into; that the contracts were connected with the affairs of the company, and materially affected the interests of the company, and were material to be made known to a person about to apply for shares; that the plaintiff took his shares on the faith of the statements in the prospectus, and would not have taken them if these

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

contracts had been disclosed or referred to in it. They further found that the prospectus was issued by the defendants as promoters, and that mention of these contracts was knowingly, that is, intentionally, omitted from it, but under a bonâ fide belief that in point of law these contracts needed not to be set forth. To the question whether these contracts had been entered into, and the mention of them suppressed, in fraud of the company and of persons invited to take shares, the jury returned no answer. Treating the shares as valueless, they found a verdict for the plaintiff for the full amount of the price paid for them.

Looking upon the omission to answer the last question, which in fact was not in issue, and was therefore wholly superfluous, as unimportant, and on the finding as to the belief of the defendants relatively to the law—which by the way I do not see a tittle of evidence to support—in the same light, the learned judge, on the other findings of the jury, directed a verdict to be entered for the plaintiff, but respited judgment, giving leave to either party to move for judgment on the findings. Application was made to the Divisional Court for judgment by both parties, but the defendants applied also for a new trial, on the ground, 1, of misdirection on the part of the judge in not directing a verdict for the defendants or a nonsuit; 2, that the finding of the jury that the defendants had issued the prospectus as promoters was contrary to the evidence; 3, that the verdict of the jury in respect of the amount of damages was contrary to the evidence, and also to the direction of the judge. A rule nisi was granted as regards the alleged misdirection, but was refused as regards the verdict being against evidence. The rule as granted was discharged after argument, and judgment ordered to be entered for the plaintiff for the amount of the verdict. Against these decisions of the Divisional Court the present appeal is brought.

The questions for our decision are: 1. Were the defendants, at the time the contracts in question were entered into, promoters of the company? 2. If so, were these such contracts as it was necessary to refer to in the prospectus, under the 38th section of the Act of 1867? 3. Was the prospectus issued by the defendants, or either of them, within the meaning of the Act? 4. Were they, or either of them, promoters at the time of such issuing? 5. Was

the prospectus issued by them "knowingly" within the meaning of the section? 6. Were the damages awarded on the right footing?

That the defendants at the time these contracts were entered into were promoters of the company cannot admit of doubt. They were in reality the creators of the company, and were engaged in forming and constituting it at the time the contracts were made. It was with a view to, and in the course of its formation, that these contracts were executed. The question whether these contracts were within the 38th section is one of greater difficulty. It becomes necessary to consider the words of the enactment. "Every prospectus of a company shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of the prospectus, whether subject to adoption by the directors, or the company, or otherwise; and any notice or prospectus not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

That it was material that the contracts in question should be made known to persons invited to take shares, in order to enable them to form a judgment as to the policy of so doing, is established by the finding of the jury; and the facts to which attention has been drawn abundantly warrant that finding. That it was important to such persons to know what these contracts would have disclosed, namely, that the scheme was one got up between the owner of the concessions, the promoter, or, as he has been called, the financier, of the company, and the contractors—that the chairman of the intended company had entered into an agreement with the contractors whereby they were to pay him a sum of money for the concessions if the company should be formed and the contractors should obtain a contract, and still more, that the principal promoter was to receive a sum of 52,000*l.*, upwards of one-seventh of the entire capital of the company—of which 6000*l.* was to go to the directors, and 10,000*l.* was to be expended in giving a fictitious value to the shares—that while the capital of the company was

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

stated to be 200,000*l.* with a power of borrowing to the extent of 150,000*l.* more, in reality it would be less by 72,000*l.*; and that while the sums to be expended on the work and on the acquisition of the concessions and the preliminary expenses was stated to be 310,000*l.*, the items referred to were to swallow up a sixth of that amount—or that such circumstances, if known, would have been calculated to create a well-founded distrust—cannot, I think, admit of a moment's doubt. Such a state of things could not but inspire distrust. The prospect of gain is apt to make men careless of the interests of others. In the present instance a prudent man, if he had been made aware of these contracts, might well have anticipated what in fact came to pass, namely, haste and precipitancy in launching this project, in which the parties to these contracts were so much interested, without due inquiry or consideration of the interests of the future shareholders, to say nothing of an unwise perseverance in it when it ought to have been seen to be a failure, and should have been abandoned. These were clandestine contracts which involved spoliation of the future company. It is in vain that Mr. Grant tells us that he was justified in demanding 10 per cent. on the capital of the company in reward for his services in forming it. He was to receive more than twice that amount, a sum extravagantly in excess of any services rendered by him. But whether a promoter may claim for his services in forming a company a reward to be paid from its funds, or whether the sum to be paid may be fair or excessive in the particular instance, is not the question. The question is whether, to prevent extortion and abuse, such contracts must not be disclosed. While, on the one hand, the amount of such secret payment may be reasonable, on the other, it may obviously be so large as to cripple the resources, and frustrate the success of the future company.

Among the first things as to which a careful man, disposed to invest in an undertaking, would inquire, would be the adequacy of the capital to the intended purpose, adequacy of capital being essential to the success of an enterprise. He satisfies himself on the point; but he is kept in ignorance of a secret agreement, whereby a large proportion of the capital, or of the amount to be paid to a contractor, is to be withdrawn from its ostensible

purpose, and expended in corruption. Had he been made aware of this, he might not have consented to join the company.

The next point which a man would desire to ascertain would be the constitution and probable management of the company. What would he say if he were told that the owner of the concessions which the intended company was to purchase was to be the chairman of the board, and was only to be paid by his buyer if he (the buyer) got a contract from the board, which contract was to be procured for him by the promoter, who, again, was to receive a large sum of money for getting it, which, however, he was sure to do from the chairman and the other directors, the first being interested in giving it in order to get his price for the concessions, the last knowing nothing about the business except what these interested parties thought proper to tell them.

It thus being manifestly to the interest of the shareholders that such arrangements should not be kept secret, why is it to be said that they are not within the section? That the terms of the section are large enough to embrace such contracts cannot be denied. Its terms could not be more general or comprehensive. Indeed, it is from this very comprehensiveness that, strange to say, the main argument for the limitation sought to be put on the section, so as to exclude these contracts, is derived. It is said you cannot take this enactment in its literal effect; for, if you did, it would include all the contracts of a man who happened to be a promoter or director, though relating to his own private affairs. True; and as the legislature is here dealing with public companies only, we may with perfect safety assume that the section is intended to apply to contracts relating to such companies alone. But when we have to deal with a contract undoubtedly having reference to a company, why are we to put any further restriction on the operation of the statute? It is said that the legislature in passing this section had in view a particular mischief only, such as had come to light in the case of Overend & Gurney—where in the articles of association the estate of the firm intended to be transferred to the company had been represented as solvent, while by a secret deed a sum amounting to upwards of three millions or more, and in the public statement included in the assets, was dealt with by the directors as in fact lost, so that the estate was

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

hopelessly insolvent—and that the enactment must therefore be limited to contracts by which either a benefit is secured to, or an obligation or burden is imposed upon, the nascent company. But this limitation appears to me to be much too arbitrary and narrow, and unwarranted either by the language of the Act, or by what we know of this legislation. If it had been the intention of the legislature thus to confine the effect of the enactment, nothing would have been easier than to say so in distinct terms. Why then is it to be limited to contracts entered into on behalf of, or binding on, the company? Not only is the language of the section unrestricted, but it expressly refers to contracts which do not require to be adopted by the company, as well as to those which do. Now I know of no contract which can impose an obligation or a burden on a company which would not require to be adopted by it.

But I desire to place the argument on broader grounds. I do not feel myself at liberty to speculate on what may have been the intention of the legislature when I find a positive enactment, framed in general terms, and a positive evil which is within its terms, and, as I cannot but think, altogether within its spirit, and to which it may be applied beneficially. If such a case as the present be not within the enactment, all I can say is that it ought to be. And I cannot allow myself to be led into splitting hairs, or to entering into minute verbal criticism on what I believe to be beneficial legislation. When, therefore, I find the case indisputably within the terms of the Act, when taken in their ordinary sense, why am I to give a different and narrower meaning to those terms in order to exclude it? It is admitted that a contract which imposed a burden on the company would come within the section. But, in the name of common sense, what difference is there in principle between a contract which takes money from the company's funds by an obligation directly binding the company, and one which saps those funds through a clandestine contract with a contractor? The one form of proceeding is no doubt more subtle and insidious than the other, but it is not the less prejudicial to the interest of the company, or less essential to be made known to those who are invited to join it.

I take it to be a sound canon of construction in the application of

a statutory enactment, that full effect should be given to general terms, unless from the context, or other provisions of the statute, a limitation on the general language must necessarily be implied, more especially where, had such a limitation been intended, it might reasonably have been expected to be expressed. Here nothing would have been more easy than for the legislature to say that the contracts of the promoter, to which the section applies, should be such only as affected the company prejudicially or otherwise. But nothing of the kind appears, and I do not feel myself at liberty to introduce by implication the restriction contended for, more particularly as I am at a loss, as I have already pointed out, to see to what class of contracts, as thus directly affecting the company, the enactment can have been intended to apply. It is notorious that among the various forms of spoliation to which shareholders have been exposed, private bargains made by promoters for their own gain, at the expense of the company about to be formed, have not been the least frequent. I see no reason to think that the statute was not intended to strike at such surreptitious transactions, and I do not feel myself at liberty to abridge what I think will be its salutary effect if applied to them.

I purposely abstain from entering on the question whether in this particular instance the contracts in question had any effect in bringing about the eventual failure of the company. The fraudulent character which the statute attaches to the omission to refer to such contracts in the prospectus does not in any degree depend on the result. If a contract is within the section, the omission to refer to it is made fraudulent whatever the result. The fact whether the result was brought about by it is, therefore, altogether beside the question.

It was urged on us that, if the full effect contended for was given to the 38th section, every petty contract entered into in the preliminary formation of a company, such as contracts for advertising and printing, or for stationery or offices, would have to be referred to, at the risk of otherwise incurring the penalty of the statute. But the answer to this is to be found in the provision which gives the statutory remedy only when the shareholder has taken his shares on the faith of the prospectus as published.

When it is urged that there is no impropriety in the promoter

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

of a company receiving remuneration for his trouble in forming it, and that the necessity of referring to such a contract as this would apply to cases in which no more than a legitimate remuneration had been secured, the answer is, that while the reference to such a contract in the prospectus would occasion little inconvenience, on the other hand, as such a bargain might be a most extortionate one, amounting possibly to a large proportion of the company's funds, it is essential that its disclosure should be held to be necessary. If a company, whose works can be executed for 250,000*l.*, are asked to pay 300,000*l.* to a contractor, in order that the contractor may be able to afford a bonus of 50,000*l.* to the promoter, it is but right that the shareholders should be made aware of what they are about to assent to.

Again, when it is said, as a reason for putting the restricted construction contended for on the comprehensive language of the Act, that the shareholder, if any fraud is practised upon him, has already his action at law, the obvious answer is that the statute was intended to give him protection beyond what his legal remedies afforded him. There are cases in which, in the absence of active fraud, passive misrepresentation, that is to say, silence as to some fact which it would be material to the one party to know, but which the other is not legally bound to communicate, may involve the one in loss, but in which the party suffering what amounts to a moral, but not a legal, wrong, has no remedy at law. In the ordinary transactions of life, an individual can make inquiries and require positive information, or insist on a warranty, before entering into a contract or embarking in a common enterprise. But in these vast undertakings, carried on by the united enterprise and capital of hundreds, perhaps thousands, of shareholders, the individual shareholder is more or less at the mercy of those who invite him to join the company, as to the facts on which he may be led to invest his money. Experience has shewn that shareholders may be plundered, not only by being led to invest in bubble companies, but also where the undertaking is intended to be carried out (as was, I have no doubt, the case in the present instance) by the resources of the company being impoverished by clandestine agreements, from which failure of the enterprise results, or by the company

being made to pay largely in excess of the value of what it gets by the cupidity of those who set it going, and that shareholders may be victimised by being made to pay more than the real value of their shares, owing to dishonest or improvident bargains made in the inception of the undertaking, and not disclosed in the prospectus. It was, I must assume, to protect the shareholder against these things, and to insure him all the information necessary to judge of the merits of the undertaking, that the enactment in question was passed, which requires, as I read it, that he shall be informed of all contracts entered into in the inception and formation of the company prior to the invitation to the public to join it by taking shares. It was for this reason, I presume, that contracts entered into by promoters, who are the parties by whom companies are usually formed and set going, are expressly included. If contracts binding or affecting the company had alone been intended to be within the operation of the statute, as these contracts, to be binding, would have required to be adopted by the directors, or the company, they would have become the contracts of the company, and would not have needed to be referred to as contracts of the promoters. To hold that the statute left the shareholder in no better position than that of a party to an ordinary contract at law would be simply to render the enactment nugatory.

The case in which a man, who has acquired a right, makes it over to a company, though perhaps at an exorbitant price, falls very far short of this. Here by an insidious contrivance, the exorbitant price is concealed in the sum to be paid to the contractor, whose clandestine arrangement with the recipient is unsuspected, and who is supposed to be asking no more than a fair remuneration for the work to be done.

Taken at its best the statute affords but a poor protection to the shareholder, and falls very far short of what it should have effected, inasmuch as it requires only the names of the parties and the dates to be stated, without any reference to the substance of the contracts. Nevertheless, the mention of such names and dates, may afford some assistance to the invited shareholder, and help him towards judging of the soundness of the proposed undertaking. Thus the fact of contracts having been entered into between the chairman and the contractors, and between the

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

latter and a well-known financier, on the very eve of the company being formed and the prospectus issued, if disclosed, might have made a prudent man hesitate to join the company until further information as to the nature of these contracts had been obtained. The insufficiency of the legislation affords no ground for abridging its operation. All we have to look to is whether a contract, if set out in full, would have been within the section. If it would, we must hold that the omission of the particulars which the enactment requires amounts to a fraud on the shareholder who has acted on the faith of the prospectus.

Thus far I have dealt with the question on principle, irrespectively of authority. Nor is there very much authority on the subject. In *Cornell* v. *Hay* (1), which was an action brought by a bondholder in the Canadian Oil Works Corporation against a director, under the 38th section, for not having disclosed in the prospectus certain contracts entered into by the promoters with the defendant and the other directors, whereby the promoters engaged to give them certain sums in cash, or paid-up shares, in consideration of their becoming directors, Mr. Justice Honyman observing on the argument of Mr. Williams, that the contracts referred to in the 38th section were limited to contracts "made by promoters, as representing, or on behalf of, the company," "contracts of which the burden would fall on the company, and which, in substance, though not in form, amount to contracts of the company," says: "In the view I take, it is unnecessary to decide whether we shall adopt the construction of the section for which Mr. Williams so ably contended, namely, that the contracts intended by the section are only contracts made, or intended to be made, on behalf of the company; but I wish for my own part to say that I am not, as at present advised, prepared to adopt that construction. I cannot think it is a matter of indifference to the shareholders what contracts were entered into by promoters in their private capacity relating to the formation of the company. It is obvious that it may be of vital importance to them to know of such contracts in forming a correct judgment as to the position of the company. It might obviously make a very great difference if the names of persons who appeared on the prospectus as interested in or connected

(1) Law Rep. 8 C. P. 328.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

with the company were mere dummies, and such persons really had no stake in the concern at all." Mr. Justice Keating says: "I do not wish to be understood as giving any countenance to the argument that the contract disclosed in this declaration is not a contract such as the directors would be bound to disclose in the prospectus under the section. It seems to me that its subject-matter was such that a shareholder might reasonably be entitled to be made acquainted with it, and its non-disclosure appears to me to be within the mischief contemplated by the Act." But these observations can only be received as obiter dicta, for the case was decided on another ground, namely, that the plaintiff, not being a shareholder, but a bondholder, was not within the protection of the statute—another instance, I may observe in passing, of the carelessness with which this section was drawn.

But in another case arising out of the same company, the case of *Charlton* v. *Hay* (1), the question now raised came before the Court of Queen's Bench for decision, the action being founded on the non-disclosure of the same contracts as were relied on in *Cornell* v. *Hay* (2), as also of a contract between Prince, the vendor to the company, and the promoters, whereby Prince was to receive only part of the purchase-money, leaving the remainder to be divided among the promoters. Mr. Justice Blackburn, with whom Mellor and Lush, JJ., concurred, held all the contracts to be within the 38th section. With reference to the contracts with Prince, he says: "We have to say whether this is a contract required to be disclosed by the terms of the section; and it seems to me that not only is it clearly included in these terms, but further, if it were not, the legislature has failed to express what was certainly its intention and object. This one of the alleged contracts is at all events of immense importance to all the shareholders of the company, and even if not subject to adoption by the directors or the company, it otherwise comes within the description given of the contracts required to be specified." This decision is directly in point to the case before us. For what difference can there be in principle between money taken from the funds of a company by a secret bargain between the vendor and the promoters, and money so taken by secret bargains between the vendor, the promoter, and the contractor?

(1) 31 L. T. (N.S.) 437. (2) Law Rep. 8 C. P. 328.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

7 C.P.D. 253.

But we are referred to *Gover's Case* (1) as in conflict with the foregoing; and as the decision in *Gover's Case* (1) was that of a Court of Appeal, if the decision really governed the case before us, we should be bound by it. But it does nothing of the sort. The question how far the omission of the contract there relied on by the plaintiff was within the 38th section was unnecessary to the decision of the cause, which proceeded, as held by all the Court, on the ground that, the suit being instituted by the plaintiff, Miss Gover, to have her name removed from the list of shareholders on the ground of the omission of a particular contract from the prospectus, the suit could not be maintained, as the section gave no right to a person who complained only of fraud within the 38th section, to have his or her name removed from the list of shareholders, the only remedy given by it being a right of action against the individual wrong-doer. It is true there fell from the Lord Justice James expressions with reference to the contract which might lead to the conclusion that he deemed such a contract as not within the statute. But his reasoning is entirely founded on the assumption that at the time the contract relied on was entered into, there had been neither company nor promoter. The contract in question was one by which one Mappin had bargained with a man named Skoines, the owner of a patent for an invention relating to gas-lighting, that, in consideration of 1000*l.* paid down, Skoines should convey the patent-right, if he (Mappin) could form a company to buy and work the patent, on receiving a further sum of 4000*l.* in cash and 60,000*l.* in paid-up shares of such company. If Mappin failed to form the company within a certain time, the bargain was to be void, Skoines retaining the 1000*l.* At a later date an agreement was entered into by Mappin with one Wright, as trustee for an intended company, by which Mappin agreed to sell the patent to Wright for about twice the amount he had agreed to pay to Skoines. Referring to the agreement between Skoines and Mappin, Lord Justice James says: "At the time when this agreement was made there was no company in existence, and *no promoter*, trustee, or director; the company had not even an inchoate existence, except in the brain of Mappin; and the utmost that can be said of Mappin was that he was a projector of a company which he intended and

(1) 1 Ch. D. 182.

had agreed to promote." Further on the Lord Justice says, "It is said, that when the bargain with Skoines is looked at, it contains stipulations about the forming of the company, and the shares of the company. I cannot myself see that the Court has, for this purpose, any right to read those stipulations. They were stipulations between Mappin and Skoines alone, and obligations as between them. Even if they were stipulations by Mappin to do something wrong in the company, or to the company, this might be evidence of that wrong, and proper redress might be given for that wrong, as a substantive ground for complaint. But that is, in my judgment, wholly beyond this section; and no impropriety in the contract can make it the contract of the company, or the contract of a promoter, trustee, or director of a company, when at the date of the contract there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties."

The Lord Justice deals with the case as though Mappin, having bought from Skoines, had simply sold to the company, and stood to them in the relation of an ordinary vendor to an ordinary purchaser, and was consequently not bound to disclose the contract whereby he himself had acquired the property.

In this judgment Lord Justice Bramwell concurred, adding only that to be within the 38th section a contract entered into by a promoter must be read to mean by a promoter *as such*.

Lord Justice Mellish appears to have taken a different view. He says: "I do not at present agree with the whole of the reasoning of the Lord Justice on this part of the case. If, indeed, the 38th section could be confined to contracts made by promoters and directors in their character of promoters and directors, or after they had become promoters or directors, the contract between Skoines and Mappin would not be within the section, because I agree that there was no fiduciary relation at the time when the contract between Skoines and Mappin was made. I think, however, that there are grounds for holding that this would be too narrow a construction, and that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract, or have become

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

liable to perform the provisions of the contract before the prospectus was issued."

Lord Justice Brett took a still wider view. He held that the enactment was remedial, and must therefore receive as large an interpretation as its phraseology would reasonably admit of, and, consequently, that it was intended to insure the disclosure of everything which might reasonably have an effect on the mind of an interested subscriber for shares as to whether he should trust the representation made to him, and became a shareholder.

It would be sufficient for the purpose of the present case to point out that, independently of this difference of opinion on the effect of the 38th section, *Gover's Case* (1) differs essentially from the one before us, inasmuch as there can be no doubt that here the contracts were entered into by the defendants when undoubtedly promoters of the company, with a view to, and incidentally to its formation. Mr. Grant cannot in any sense be said to have been a purchaser from the duke, or a vendor to the company. He carefully avoided assuming that relation. His position was, though not ostensibly, yet actually, that of a promoter. Fully admitting that a person who sells to a company is no more bound to disclose how, or upon what terms, he acquired the subject-matter of the sale, than an ordinary vendor to an ordinary purchaser, it seems to me that when the vendor adopts the character of a promoter, the matter assumes a very different aspect. A fiduciary or, at all events, a quasi-fiduciary, relation arises between him and the company. He is bound to protect its interests, and those of the shareholders. All his dealings with them, and for them, should be uberrimæ fidei. He should conceal nothing from them which it is essential to them to know. If he proposes to appropriate to himself any part of their funds as a reward for his services, or to derive advantage by selling to them at a profit, any contracts by which effect has been given to such purposes come, I cannot but think, within this protective enactment. Nor, as I venture to think, does the reasoning of Lord Justice James, when rightly weighed, militate against this position.

Subsequently to the decision in *Gover's Case* (1), a judgment

(1) 1 Ch. D. 182.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

adverse to the view I feel myself bound to adopt, and which I desire to treat with the utmost respect, but which, sitting here in a court of appeal, I am called upon to review, was pronounced by Vice-Chancellor Bacon in the case of *Craig* v. *Phillips* (1). There the defendant, having invited the plaintiff and others to join in a joint stock company for the purchase and working of a colliery, bought the colliery and then sold it at an advanced price to trustees for the company proposed to be formed. In the prospectus which he afterwards issued, and on which his name appeared as managing director, reference was made to the contract with the trustees, but none to the defendant's own purchase. The Vice-Chancellor held that the omission was not fraudulent within the 38th section of the Act of 1867. In this judgment, for the reasons I have already detailed, taking, as I do, a different view of the effect of the statute, I am unable to concur.

7 Ch D 2

Feeling myself, for the reasons I have given, unfettered by what may have been said in *Gover's Case* (2), I desire to go further. I do not hesitate to say that had this case been on all fours with *Gover's Case* (2), I should have adopted the view there taken by Lord Justice Brett. I think with him that the enactment of the 38th section was intended to be remedial. I think it was intended to protect the shareholder against deceptions too often practised in the creation of companies, by insuring him full information as to all the material circumstances attending the formation of the company he is invited to join, antecedently to the issuing of the prospectus. I am, therefore, of opinion that it was rightly left to the jury in the present case to say whether the contracts in question were material to the interests of the company, and material to be made known to the shareholder, and that, these questions having been found in favour of the plaintiff, the case was within the 38th section, and consequently that the decision of the divisional Court in discharging the rule nisi for misdirection was right.

I proceed to consider whether there is any ground to quarrel with the verdict as not having been warranted by the evidence. Was the prospectus issued by the defendants? Was it issued by them as promoters? The solution of these questions depends in the first place on whether any special signification attaches to the

(1) 3 Ch. D. 722. (2) 1 Ch. D. 182.

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

term "issuing" or to the term "promoter." It is contended, on behalf of the defendants, that the issuing of the prospectus means the passing and publication of it by the directors, and that the issuing, by whosesoever hand effected, must be taken to be their act alone. Now there is nothing in the Act to indicate the sense in which the term "issue" is used. I think it must be taken to mean the making the prospectus public, after its adoption, with a view to inviting persons to take shares and become members of the company. I agree in thinking that it must be taken to refer to an official publication, authorized by those who at the time have the government of the company, which in this instance would be the directors. It would otherwise not be the prospectus of the company. So authorized, the publication, by whomsoever actually carried into execution, would be the act of the directors, on the principle that the authorized act of an agent is always the act of the principal. But the act, though done by the authority of a principal, and in that sense the act of the principal, remains none the less in point of fact the act of the agent, and, if wrongful, makes the agent liable for its consequences. And here, if the issuing of the prospectus was in contravention of the statute, the act would be wrongful, and the party actually issuing would, I think, be responsible. Now, that in this sense the prospectuses, though issued nominally and officially by the directors, were in point of fact actually issued by the defendant Mr. Grant admits of no doubt. The printing and publication of the prospectus were effected under his immediate direction. But the complicity of the other defendants is not equally clear. All that appears is that as soon as the prospectuses were ready to be sent out, a large number were sent to them by Grant for the purpose of distribution. But the proof that all the defendants were acting throughout in concert is so strong that, though I could wish that the question had been left more specifically to the jury, I cannot quarrel with the finding, which includes all the defendants in the issuing of the prospectus.

But were the defendants promoters at the time of issuing? It is contended that, even if promoters in the outset, they ceased to be so the moment the company was constituted and the governing body, the directors, were appointed. This contention was mainly

founded on a provision of the 7 & 8 Vict. c. 110, s. 3, which says that promoters shall continue to be such till the complete registration of the company, at which time directors would be appointed. But that Act, which had reference to a system of registration widely differing from the present, has been repealed, and there is now no statutory limitation to the functions of a promoter. The question as to when one who in the outset was a promoter of a company continues or ceases to be so, becomes, therefore, as it seems to me, one of fact. A promoter, I apprehend, is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose. That the defendants were the promoters of the company from the beginning can admit of no doubt. They framed the scheme; they not only provisionally formed the company, but were, in fact, to the end its creators; they found the directors, and qualified them; they prepared the prospectus; they paid for printing and advertising, and the expenses incidental to bringing the undertaking before the world. In all these respects the directors were passive; without saying that they were in a legal sense the agents of the defendants, they were certainly their instruments. All the things I have just referred to were done with a view to the formation of the company, and so long as the work of formation continues, those who carry on that work must, I think, retain the character of promoters. Of course, if a governing body, in the shape of directors, has once been formed, and they take, as I need not say they may, what remains to be done in the way of forming the company, into their own hands, the functions of the promoter are at an end. But, so long as the promoters are permitted by the directors to carry on the work of formation, the latter remaining passive, so long, I think, would a jury be warranted in finding that what was done by them was done as promoters. Here again, therefore, I see no reason for disturbing the verdict.

Next, was the prospectus issued by the defendants "knowingly," within the meaning of the section? It was contended that the term "knowingly" must be taken to mean with a knowledge that the contracts were such as the statute required to be referred to: consequently, that, the jury having found that the mention of the contracts was omitted from the prospectus from a bonâ fide

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

belief that such mention was unnecessary, the contracts had not been "knowingly" omitted. But this is to misconceive the meaning of the term. "Knowingly issuing" means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an Act of Parliament.

I come, finally, to the question of damages. It is to be observed that no exception is taken to the question as left to the jury. It was left to them to say whether the loss sustained by the plaintiff amounted to the entire price paid for his shares, or to less than that amount, and to give damages accordingly. It is admitted that this was the right issue; nor is any objection taken to the direction of the judge, except that it is suggested that it might have been more full and explicit—a suggestion in which there might have been more weight if there had been fuller materials to which the observations of Lord Coleridge might have been directed. Nevertheless, when the grounds on which the verdict is questioned are more closely looked at, it becomes manifest that they do in substance involve a complaint of the direction of the judge, as not having brought to the attention of the jury the various elements into which the question of damages resolves itself.

The first contention on the part of the defendants is that the utmost loss which has accrued to the shareholders is that which they have sustained through the suppression of the contracts omitted from the prospectus, as to the 72,000*l.* secured by them to the parties interested, and which has thus been added to the cost of the construction of the lines, which it is contended would equally have been constructed, but which would otherwise have been constructed at the lesser sum; and, consequently, that the utmost that the plaintiff can claim as damages is the proportion of that sum which his seventy shares bear to the 20,000 shares which form the sum total of the company. The shareholders, it is said, have got that which was to be the consideration for their money, namely the tramway and the rolling stock; but they have got it dearer than it need have cost by 52,000*l.* They are therefore entitled to a return to that amount, and the plaintiff to his

proportionate share, but no more. But this contention is founded on what appears to me to be a transparent fallacy. The complaint of the plaintiff is that he has been induced by a suppression in the prospectus, to which the statute attaches the character of fraud, to take shares in an undertaking, which, but for this suppression, he would not have joined, and which has turned out to be worthless—a fact which the jury have found in his favour. His grievance is not that he has paid too high a price, but that he has been induced to take shares which, but for the fraud, he would not have taken at all. He is, therefore, in the position of a person who has been induced to take shares and pay the price of them by a fraudulent misrepresentation, and he is, therefore, entitled to recover such damages as have resulted to him from taking such shares. If this damage extends to the entire price paid for the shares he is entitled to recover it.

But dismissing this contention as untenable, a more serious objection presents itself. Assuming that the plaintiff is entitled to have all the loss made good to him which has accrued upon his shares, when and how is that loss to be estimated?

A party who has been induced by fraudulent misrepresentation to purchase a given article, unless he rescinds the contract and returns the thing bought, which in such a case as the present it is admitted that the plaintiff is not in a position to do, can only recover damages to the extent of the loss he has actually sustained. He can not recover the entire price he has paid, unless the thing prove wholly worthless. If the thing has any appreciable value, the damages must be reduced pro tanto. If the plaintiff's shares were of any value, that value, in assessing the damages, must be deducted from the price. Now, the first question which presents itself is as to the time at which that value, if any, is to be determined? Is the value to be sought at the time the shares were first acquired? or when, by his own voluntary act, the plaintiff put an end to the undertaking? or at the time when the action was brought? If the first, what was the value of the shares when issued? If the second, was the course taken by the plaintiff in causing the company to be wound up a reasonably proper course under the circumstances? For if the shares had at that time any value, and the plaintiff has, by his

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

own act, destroyed or diminished that value, he cannot throw the loss so occasioned on the defendants.

If, say the defendants, the undertaking was a genuine one, and would have succeeded if properly managed, but has failed, and the value of the shares has been destroyed or diminished, as the case may be, not from any defects inherent in the original project, but from extrinsic causes (such as the bad management of those who had the conduct of its affairs, or from the change in the route, or from other causes), we are not liable in damages for any depreciation supervening from causes which we could not in reason have been expected to foresee. What if, here, the scheme would have proved successful, but the country had been invaded and the works destroyed by the enemy, or part of the line had been swallowed up by an earthquake, could the defendants have been held responsible? Or if, the success having been partial only, the value of the shares had become lessened through such a disaster happening, could the defendants be made to answer for more than the difference? It is not enough to say that but for the misrepresentation or fraud the purchaser never would have bought, and therefore would not have lost the thing bought. To recover back the whole price, if the thing had any value when bought, he must be in a condition to rescind the bargain and replace it, which here the plaintiff is not, as it is not in his power to make the company take back the shares, or in the power of the company to resume them.

4 QBD. 683. 17 QBD 312

If a man is induced by misrepresentation to buy an article, and while it is still in his possession, it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration which has arisen from some other supervening cause. If a man buys a horse, as a racehorse, on the false representation that it has won some great race, while in reality it is a horse of very inferior speed, and he pays ten or twenty times as much as the horse is worth, and after the buyer has got the animal home it dies of some latent disease inherent in its system at the time he bought it, he may claim the entire price he gave; the horse was by reason of the latent mischief worthless when he bought; but if it catches some disease and dies, the

buyer cannot claim the entire value of the horse, which he is no longer in a condition to restore, but only the difference between the price he gave and the real value at the time he bought.

I should agree that the law as just stated should have been pointedly brought to the attention of the jury with a view to the damages, could I find in the facts of the case any materials to which it would be applicable. But I find none. The shares were wholly valueless at the time the action was brought. They were so when the company was put an end to. In fact they were so from the beginning, from radical defects inherent in the project from its birth. The project failed as at first proposed, because difficulties were found to exist which it would have required too great an expenditure of capital to overcome; in its second form, to which, be it observed, the defendants were equally parties, because the traffic was insufficient to afford a remunerative return. The shares may have had for a time some factitious value in the share-market; but the plaintiff, having invested, was not bound to sell, but was fully entitled to wait till the lines were actually worked. When practically tested the enterprise failed, and the shares proved worthless. The measure of damages is, consequently, the price the plaintiff was induced to give for them by the statutory fraud on which the action is founded.

If, indeed, there were reason to think that, upon another hearing, any of the facts to which reference has been theoretically made for the purpose of the argument could be established by the defendants, I should be disposed, looking to what occurred at the trial, to afford an opportunity for proving them by granting a new trial on payment of costs. I think it is much to be regretted that, when the defendants offered to submit to a verdict for the entire amount claimed, the plaintiff should have been allowed to to go on, there being, in my opinion, no pretence for treating this as a test action, and the only purpose of such an action, as recognised by the law, being the recovering of damages. But the defendants need not have withdrawn. As they chose to do so, they must abide the consequences, and on this appeal must stand or fall by the facts as proved on the trial. Nor do I see any reason to think that these facts can be altered. The material facts, to which I have already adverted, are too clear to be disputed, and

1877

TWYCROSS v. GRANT.

C. A.

Cockburn, C.J.

show the shares to have been from the beginning devoid of real intrinsic value. The defendants, it is true, suggested, not, indeed, as a fact on which they intended to rely, but as a reason for avoiding unnecessary exposure of the late company's affairs by a public inquiry, that some negotiation was on foot for obtaining fresh capital and reviving the undertaking with some advantage to the former shareholders. But of the actual existence of any such scheme, or prospect of its success, at the time of bringing the action, or even at the time of the trial, and still less since the trial, we have not a shadow of proof, and I can only treat it as visionary. Still less is there anything to show that any such negotiation could resuscitate the defunct company, or give any appreciable value to their before worthless shares. If there existed any further facts beyond those proved at the trial, of which the defendants desired to take advantage, they might have been brought before the Divisional Court, or before us, on affidavit; but nothing of the sort has been attempted—a fact by which I cannot help being struck. My conviction is that if this cause were sent down to a new trial, the facts would remain unaltered, in which case the proper measure of damages would be that which has been awarded by the jury, namely, the full price of the shares. I see no ground, therefore, for sending the case to a new jury in respect of the damages.

For these reasons I am of opinion that this appeal should be dismissed.

C. A.

Brett, L.J.

BRETT, L.J. I did not think it necessary to prepare a separate judgment, as I entirely concur in that just delivered by the Lord Chief Justice, both in its reasoning and in its results, and having had occasion in *Gover's Case* (1) to express my opinion fully on the subject, I have merely to say that subsequent consideration and all I have since heard urged in argument only induce me to adhere to the opinion I then expressed.

The Court being equally divided, the judgment of the Court below stands.

*Judgment affirmed.*

Solicitors for plaintiff: *Mercer & Mercer.*

Solicitors for Clark & Punchard: *Blunt & Co.*

(1) 1 Ch. D. 182.

EVANS *v.* LADY MOSTYN AND OTHERS. 1877
*April* 20.

*Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *ss.* 13, 41—*Liability to fence abandoned Shafts — "Persons interested in the Minerals."*

Sect. 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), enacts that, where a mine to which the Act applies is abandoned, or the working thereof is discontinued, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be securely fenced for the prevention of accidents,—provided that, subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section: and by the interpretation clause (s. 41) "owner" means any person who is the immediate proprietor, or lessee, or occupier of any mine, and does not include a person who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine.

The respondents, who were owners in fee of mines and minerals, demised a lead mine, part of the estate, for a term of years, subject to a rent or royalties, such royalties to be paid upon the place where the ore should have been gotten or weighed and before it should be taken away; the lease also reserving to the respondents powers of distress and re-entry if the royalties should be in arrear. The lessees ceased working the mine and left and allowed it to remain insufficiently fenced:—

*Held*, that, although the lease was still in force and undetermined, the respondents were guilty of an offence under s. 13 as "persons interested in the minerals of the mine."

CASE stated by Justices of Flintshire under 20 & 21 Vict. c. 43.

An information preferred against the respondents under the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), charging that they, on the 25th of September, 1875, at the parish of Mold, in the county of Flint, did leave a certain shaft in a wood known as the Coed Tyn-y-Cornel Wood, near to the highway between Mold and the Loggerheads, unfenced and in a dangerous state and condition, was heard and dismissed.

It appeared that the respondents are the owners in fee of certain mines and minerals in a considerable tract of land in Mold, having also surface rights for the purpose of working, getting, and carrying away such minerals. On one part of the estate is a lead mine which in 1868 was demised for twenty-one years from the 29th of September, 1864, to a company called "The Mold Mines, Limited."

1877

EVANS v. MOSTYN.

By the lease there was reserved to the lessors certain farm-rents or royalties upon the ore raised during the term, "such farm-rents or royalties to be paid at the time of weighing the ore, &c., at or upon the place or places where the same shall have been gotten and weighed, and before the same shall be carried away." The lessees covenanted "from time to time during the continuance of the demise to well and sufficiently secure all and every the pits and shafts now sunk upon the lands, or which shall be dug, sunk, and made thereon in any part or parts thereof during the said term, so that man and beast shall be free from danger thereby." The lessors reserved to themselves a power to use any drifts, levels, watercourses, adits, or passages, or to make any fresh drifts, &c., in or upon the premises demised, or the surface thereof, for the purpose of working their adjoining mines; a power of distress for any farm-rents or royalties in arrear, and also a power of re-entry if such farm-rents, &c., should be in arrear for thirty days, or upon breach of any of the covenants in the lease. The company commenced operations at the mine in the year 1868. They continued to carry on the works up to about two years ago, when operations ceased. The company are in liquidation. They were not working the mines, although they had a considerable plant upon the surface; a man being in charge of it. The respondents have not re-entered the premises.

In a wood of several acres in extent, and adjoining the Mold and Ruthin turnpike road, which runs through the sett, is an old shaft. This shaft together with the minerals under the wood is comprised in the demise to the Mold Mines Company, and has not been in actual use for more than twenty years. It was sunk by former lessees of the mines. The wood in which the shaft is is walled round, and ten years ago a gentleman whilst engaged out shooting fell down the shaft, and was injured. The shaft is about five to eight yards from the wall adjoining the turnpike-road.

In May, 1875, the appellant, who is the government inspector of mines for Flint, gave notice to the agents of the respondents, and called their attention to s. 13 of 35 & 36 Vict. c. 77, and required the shaft in question to be fenced, on the ground that it was specially dangerous. On the morning of the hearing before the justices he inspected the shaft again, and found it was not

then sufficiently fenced. The mouth of it was covered with boards upon which stones were placed; but, in the inspector's opinion, the boards were unsound; and further, in his opinion the shaft ought to be fenced with strong wood or stone breast high. The fencing had been done by the man in care employed by the Mold Mines Company, at the request of the respondents' agent.

The justices were of opinion that, although s. 13 of the Metalliferous Mines Regulation Act, 1872 (1), imposes the obligation on the "owner" of the mine and every other person interested in the minerals of the mine, s. 41 cuts down the meaning of owner, and excludes the proprietor of a mine which is subject to a lease for the working thereof; that the respondents were exactly in that position; that the words "every other person interested in the minerals," could not mean any person out of the class of persons intended by the word "owner" as limited by the interpretation clause; that they had no more power to convict the respondents than the owner of the soil; and that they could only convict the lessees and occupiers, who were not before them.

The question for the opinion of the Court was, whether, assuming that the shaft was not sufficiently fenced within the meaning of the Metalliferous Mines Regulation Act, 1872, the justices ought to have convicted the respondents.

(1) 35 & 36 Vict. c. 77, s. 13, enacts that, where any mine to which this Act applies is abandoned, or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents: Provided that,—

(1.) Subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect.

(3.) If any person fail to act in conformity with this section, he shall be guilty of an offence within this Act.

Sect. 41. In this Act, unless the context otherwise requires, the term "owner," when used in relation to any mine, means any person or body corporate who is the immediate proprietor or lessee or occupier of any mine, or of any part thereof, and does not include a person or body corporate, who merely receives a royalty, rent, or fine from the mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines.

1877

EVANS v. MOSTYN.

*Sir John Holker, A.G.* (*Sir H. Giffard, S.G., Gorst, Q.C.*, and *C. S. Bowen* with him), for the appellant. The lessees have abandoned the mine, leaving the shaft in question unfenced and in a dangerous condition. The question is, upon whom is cast the duty of fencing. The respondents are "persons interested in the minerals of the mine," and therefore are not within the exception in s. 41, for they have reserved to themselves a lien upon the minerals for the rent and royalties. They are therefore equally liable with the lessees, with a possible remedy over against them on their covenant.

*Coxon* (*McIntyre, Q.C.*, and *Hughes* with him), for the respondents. The reservation of the lien gives the lessors no interest in the minerals. To render them liable under s. 13, they must be persons having a direct interest in the minerals, not merely the benefit of a contract. The interpretation clause shews that the legislature had in their contemplation lessees only,—the persons having the present legal interest in the mine or in the minerals raised. At all events, the words of the section are not plain enough to impose the burthen upon the lessors.

*Gorst, Q.C.*, in reply. The argument on the part of the respondents would apply the words "not interested in the minerals" to the whole of the exception in s. 41, whereas it is plainly intended to be confined to the last limb of the sentence. The respondents by the terms of the lease are persons having a present interest in the minerals of the mine. They have a power to distrain, a lien upon the minerals, and a right of re-entry.

GROVE, J. This case is by no means free from difficulty. I have entertained some doubt during the argument; but, upon the best opinion I can form, I have come to the conclusion that the respondents are liable to fence this shaft, and have consequently incurred the penalty imposed by s. 13 of the Mines Regulation Act, 1872. The question turns upon the language of that section coupled with that of the interpretation clause, s. 41. It is admitted that the shaft is an abandoned shaft, and that it was not properly fenced. Now, s. 13 enacts that, "where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance

occurred, the *owner* thereof, and *every other person interested in the minerals of the mine*, shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents." The interpretation clause, s. 41, provides that the term "owner," when used in relation to any mine, shall mean any person or body corporate who is the immediate proprietor or lessee or occupier of any mine or of any part thereof;" and shall not include "a person or body corporate who merely receives a royalty, rent, or fine from the mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine." The whole question turns upon who are "other persons interested in the minerals of the mine." It is certainly somewhat singular that the lessee should fall within the term owner, and that the person having the higher interest should only be included in the general expression, "every other person interested in the minerals of the mine." But that is only an apparent difficulty. I feel a much greater difficulty in seeing who is meant by "every other person interested in the minerals of the mine," if those words do not include these respondents. It has been suggested that they may apply to a trustee or a cestui que trust: but I was not much impressed by that argument. The more formidable one was the suggestion that the clause must refer to persons having a present and not a remote interest in the minerals or an interest arising from contract. Seeing the extreme difficulty of finding any person who could be fixed with liability to fence, except those who have a direct interest, who get the royalty, it is not easy to say why they should be excluded, except for the singular way the section is framed. Then, there is the other point. It seems from this case,—of which the lease is to form part,—there is a direct interest in these respondents. I doubt whether the reservation of a right to make and use the adits, &c., would constitute an interest in the minerals. But the clause in the lease giving the lessors a lien upon the minerals raised for the rent and royalties clearly gives them an interest therein. They are to be paid before the minerals are carried way. I therefore think the respondents are liable for the non-fencing of the aban-

1877

EVANS v. MOSTYN.

doned shaft. The power to distrain, and more particularly the lien for rent and royalties, gives them, I think, such an interest as is contemplated by the statute. It is not unreasonable that the persons who have such an immediate interest, and who probably were the persons who originally sunk the shaft in question, should be liable to fence it; and, if the persons primarily liable are not to be got at, it seems to me but right that recourse should be had against the lessors, who have the means of enforcing a remedy against the lessees. As to the words at the end of s. 41, "are not interested in the minerals of the mines," they certainly raise a little doubt as to whether they were intended to apply to the immediately preceding words "or is merely the owner of the soil," or to all the three categories included in the exception. If they are to apply to all, that rather affords an argument in favour of the respondents: if to the immediately preceding words only, the inference is the other way. The balance in my mind is in favour of the latter contention: and upon the whole I have come to the conclusion that, upon the true construction of the statute, the respondents are the persons liable to fence the shaft in question. The case will therefore be remitted to the justices with our opinion to that effect: but, inasmuch as the case involves a very nice point, and one of considerable interest to the public, I think there should be no costs.

LINDLEY, J. I am of the same opinion. The real question is whether the lessors are persons interested in the mine within s. 13 of the Mines Regulation Act, 1872. The language of that section is such as to throw upon all answering the description of owners or persons interested in the minerals of the mine the obligation to fence abandoned shafts. If that had stood alone, there could have been no doubt that these respondents were either owners of the mine or persons interested in the minerals thereof. Sect. 41, however, shews that they are not "owners." Then, are they persons having an interest in the minerals of the mine? They are the immediate lessors, the persons to whom the rent is payable. They have by the lease a lien for the rent and royalties upon the minerals raised, and a power to distrain if they remain unpaid. They have moreover a power of re-entry for a breach of

any of the covenants. Is it possible to say that persons in that position are not "persons interested in the minerals of the mine," within the meaning of the 13th section? Those who contend that they are not liable are bound to shew who answer the description more appropriately than these respondents. It is suggested that the persons who do so are trustees or cestuis que trust. Sub-s. 1, however, plainly shews that they are not the persons contemplated. Who then are? We are driven by the mere stress of language to say that they are the persons who have a present interest in the minerals, and not a remote reversioner, as has also been suggested. I think the contention on the part of the appellant is right.

*Judgment for the appellant.*

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitors for respondent: *Kelly, Keene, & Roper.*

---

WHITEHEAD, APPELLANT; SMITHERS, RESPONDENT.

*June* 15.

*Wild Birds Protection Acts, 35 & 36 Vict. c. 78, and 39 & 40 Vict. c. 29—Sale of Birds imported from Abroad.*

It is no defence to an information under the Wild Birds Protection Act, 1876 (39 & 40 Vict.) c. 29, for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom.

CASE stated by an alderman of the city of London under 20 & 21 Vict. c. 43.

Information by the appellant against the respondent, a poulterer in London, under s. 2 of 39 & 40 Vict. c. 29, "An Act for the preservation of wild fowl" (hereinafter referred to as the Act of 1876) (1), charging that the respondent, in the city of London, on

(1) The Act 39 & 40 Vict. c. 29, recites that the wild fowl of the United Kingdom forming a staple article of food and commerce, have of late years greatly decreased in number by reason of their being inconsiderately slaughtered during the time they have eggs and young, and that owing to their marketable value the protection accorded to them by 35 & 36 Vict. c. 78, is insufficient.

By s. 2, "Any person who shall kill, wound, or attempt to kill or wound, or take any wild fowl, or use

1877

WHITEHEAD v. SMITHERS.

the 10th of April, 1877, unlawfully did have in his control and possession a certain wild fowl, to wit, a plover, then recently killed, contrary to the statute, &c.

The following facts were proved or admitted,—1, on behalf of the appellant, that one Read, on the 10th of April, 1877, purchased for 1*s.* 3*d.* at the shop of the respondent in Cannon Street, City, a plover there exposed for sale, which had been recently killed,—2, on behalf of the respondent, that the plover so purchased was one of a consignment of dead plovers received by Mr. Howard, a poulterer, from Holland, and by him sold to the respondent.

On the part of the respondent it was contended that the plover in question, being a foreign wild fowl, and killed abroad, the case did not come within the Act of 1876.

On the part of the appellant it was contended that the provisions of the Act of 1876 were designed to enlarge and extend the protection of wild fowl of the United Kingdom.

The alderman came to the conclusion,—

1. That the Act of 1876, as appears by the preamble, was for the preservation of wild fowl of the United Kingdom only, and that for their marketable value as an article of food and commerce:

2. That the wild fowl in question, a plover, having been bought or received of or from some person or persons residing out of the United Kingdom, was not proved to be a wild fowl of the United Kingdom; and on these two findings he dismissed the summons.

The questions for the opinion of the Court were,—1. Whether the Act of 1876 makes it an offence for any person to have in his control or possession within the prohibited time a wild fowl recently killed, &c., although such wild fowl shall have been bought or received of some person or persons residing out of the United Kingdom,—2. Whether s. 2 of the Act of 1876 applies to the control or possession (by exposing or offering for sale in a shop)

---

any boat, gun, net, or other engine or instrument for the purpose of killing, wounding, or taking any wild fowl, or shall have in his control or possession any wild fowl recently killed, wounded, or taken, between the 15th of February and the 10th of July in any year, shall on conviction of any such offence before any justice or justices of the peace in England, &c., forfeit and pay for every such wild fowl so killed, wounded, or taken, or so in his possession," not exceeding 1*l.* with the costs of the conviction.

of a wild fowl recently killed within the prohibited time, such exposing or offering for sale being a distinct offence in itself punishable under s. 2 of the Act of 1872 (1), if such wild fowl be not bought or received of or from some person or persons residing out of the United Kingdom.

*Waddy, Q.C.* (*Bund* with him), for the appellant. The exemption in the Act of 1872 of birds bought or received of or from persons residing abroad rendering the provision abortive, the Act of 1876 was passed to remedy the defect, and to impose a penalty upon any person who shall kill or take or have in his control or possession, within the prohibited period, any wild bird recently killed. The only way of effectually protecting wild fowl of the United Kingdom is, to prevent their being slaughtered and exposed for sale under the name of foreign birds.

*Reginald Brown*, for the respondent. The Act of 1872 not being repealed by the Act of 1876, both must be read together; and, as there is then no repugnancy between the two Acts, the exemption of wild fowl bought or received from abroad must be taken still to subsist: Dwarris on Statutes, 2nd ed. 532, 533. The preamble of the Act of 1876, and the provisions in s. 3 enabling the Home Secretary, upon the application of the justices in quarter sessions, to extend or vary the time during which the killing and taking wild fowl is prohibited by the Act, shew that these statutes, (like 1 & 2 Wm. 4, c. 32, as to the killing or being in possession of game,) are applicable only to British birds.

LORD COLERIDGE, C.J. I am of opinion that the decision of the justice in this case was wrong, and that there must be a conviction.

(1) By 35 & 36 Vict. c. 78, s. 2, "Any person who shall knowingly or with intent kill, wound, or take any wild bird, or shall expose or offer for sale any wild bird recently killed, wounded, or taken, between the 15th of March and the 1st of August in any year, shall on conviction of any such offence before any justice or justices of the peace in England, &c., for a first offence be reprimanded and discharged on payment of costs and summons, and for every subsequent offence forfeit and pay for every such wild bird so killed, wounded, or taken, or so exposed or offered for sale, such sum of money as, including costs of conviction, shall not exceed 5*s.*, as to the justice or justices shall seem meet, unless he shall prove to the satisfaction of the justice, that the said wild bird was bought or received on or before the said 15th of March, or of or from some person or persons residing out of the United Kingdom."

1877

WHITEHEAD v. SMITHERS.

The question arises upon two Acts of Parliament passed for the protection of wild fowl, viz. 35 & 36 Vict. c. 78, and 39 & 40 Vict. c. 29. Sect. 2 of the first-mentioned Act enacted that any person who should kill or take any wild bird, or expose or offer for sale any wild bird recently killed or taken, between the 15th of March and the 1st of August, should incur *a penalty of* 5*s.*, "unless he should prove to the satisfaction of the justice that the bird was bought or received on or before the 15th of March, or of or from some person residing out of the United Kingdom." Under that statute it was an answer to an information of this sort if the person charged could prove that the bird which he exposed or offered for sale was bought or received by him of or from some person residing out of the United Kingdom. Then came the Act of 1876, which recited that the protection accorded to wild fowl by the Act of 1872 was insufficient, and that it was expedient "to provide for their further protection during the breeding season;" and s. 2 enacts that any person who shall kill or take, "or shall have in his control or possession," any wild fowl recently killed or taken, between the 15th of February and the 10th of July, shall on conviction forfeit and pay for every such wild fowl so killed, &c., or so in his possession, not exceeding 1*l.* It has been urged that, inasmuch as the second Act does not in terms repeal the first Act, the two are to be read together, and consequently, it having been proved that the plover in question was bought by the respondent of a person residing in Holland, that is an answer to an information under the later Act. I am of opinion that that argument is not well founded. It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is, to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad. It has been said that the second statute cannot be held to operate as a repeal of the first, because there is no contrariety or repugnancy in the two Acts. The Act of 1876, however, refers in terms to the Act of 1872, and declares that the protection afforded

by it to the wild birds was insufficient, and that it is expedient to provide further for their protection. The new provision is evidently framed carefully for the purpose of enlarging the former, which had proved in great measure abortive. The very question now before the Court arose in *Michell* v. *Brown*. (1) The Act 19 Geo. 2, c. 22, s. 1, imposed a penalty for the offence of throwing ballast, &c., into navigable rivers; a subsequent statute, 54 Geo. 3, c. 159, s. 11, provided a different punishment for the same offence, and prescribed a different mode of procedure; and it was held that the later enactment impliedly repealed the former, notwithstanding its preamble recited the expediency of repealing certain other statutes (which were repealed) and the expediency only of extending the 19 Geo. 2, c. 22. Lord Campbell, delivering the judgment of the Court, said (2): "If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, &c., we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as, by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence could not be proceeded for under the earlier statute; and the same consequence seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution, and not cumulatively, giving an option to the prosecutor or the magistrate." That in principle is very much in point with the present case. I think the respondent ought to have been convicted.

GROVE, J. I am of the same opinion. The whole frame of s. 2 of the Act of 1876 shews that it is intended as a substitution for s. 2 of the Act of 1872. The preamble declares that the protection afforded by the former Act was insufficient, and it was expedient to increase it. Sect. 2 of the Act of 1872 enacted that any person who should kill or take, or expose or offer for sale, any wild bird recently killed, between the 15th of March and the 1st of August, should on conviction forfeit for every such bird so killed or exposed or offered for sale, 5*s*., "unless he should prove

(1) 1 E. & E. 267; 28 L. J. (M.C.) 53.

(2) 1 E. & E. at p. 274; 28 L. J. (M.C.) at p. 55.

1877

WHITEHEAD v. SMITHERS.

that the bird was bought or received on or before the 15th of March, or of or from a person residing out of the United Kingdom." Sect. 2 of the Act of 1876 alters the period of limitation, and also the penalty: it enacts that any person who shall kill or take, or shall have in his control or possession, any wild fowl recently killed or taken, between the 15th of February and the 10th of July, shall for every such wild fowl, &c., forfeit a sum not exceeding 1*l.*,—making no mention of the exception as to its purchase from a foreigner. It is an entirely new section, and, though framed for a similar object, differently worded, and of increased stringency. It could not be consistently engrafted upon the former statute. The two questions put to us must be answered in the affirmative; but, as there has been no conviction, there will be no costs.

*Judgment for the appellant.*

Solicitor for appellant: *A. Leslie.*
Solicitor for respondent: *G. E. Philbrick.*

---

*June* 15.

BARBER, APPELLANT; CALLOW, RESPONDENT.

*Inland Revenue Acts*, 32 & 33 *Vict. c.* 14, *s.* 27; 38 & 39 *Vict. c.* 23, *s.* 11—*Keeping Carriage without Licence—Letting for less than a Year.*

By s. 27 of 32 & 33 Vict. c. 14, a penalty of 20*l.* is imposed upon a person keeping a carriage without a licence: and by s. 11 of 38 & 39 Vict. c. 23, "every person who shall let any carriage for hire for any period less than one year shall for the purpose of the 32 & 33 Vict. c. 14, be deemed to be the person keeping such carriage."

The respondent, a coach-builder, by an agreement in writing let to one R. two clarence cabs on hire at 30s. per week, payable weekly, the cabs to be the property of R. if he regularly paid the 30s. for seventy-five weeks consecutively, and an additional 5*l.* at the expiration of that period; but it was stipulated that, if R. should omit to make any of the weekly payments as agreed, the respondent might resume possession of the cabs:—

*Held*, that under the agreement there was no letting of the cabs for a period less than one year, so as to make the respondent the "person keeping" them within the meaning of the Act.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, by order of the

Commissioners of Inland Revenue, against the respondent, under s. 27 of 32 & 33 Vict. c. 14 (1), for keeping, without a proper licence, a carriage, for the keeping of which a licence was required by the Act.

The following facts were admitted:—The respondent, who is a coach-builder carrying on business in Islington, had not on the 12th of October, 1876, a licence under the Act authorizing him to keep a carriage. On that day two carriages were in the possession of and used by one John Rutter under an agreement of the 15th of June, 1876, and made between the respondent, who on that day was the owner of the carriages, and Rutter. The agreement was as follows:—

"Memorandum of agreement made this 15th of June, 1876, between John Callow, of &c., of the one part, and John Rutter, of &c., of the other part: The said John Callow agrees to let to Rutter two clarence cabs from this day on hire at the sum of 30*s.* per week, such sum to be paid by Rutter to Callow on each and every Friday in each week from the date thereof, in advance, as the hire of such clarence cabs, free from any reduction whatsoever on account of repairs or otherwise. And it is hereby agreed between the parties that, if Rutter shall punctually and regularly pay to Callow the sum of 30*s.* per week in manner above described for seventy-five weeks consecutively, the said clarence cabs shall be the property of Rutter on his paying the further sum of 5*l.* for the purchase thereof; and Callow shall and will hereby agree to accept the further sum of 5*l.*, for the purchase thereof. And it is hereby agreed between the parties that, if Rutter shall neglect or omit to make any of the said weekly payments at the time or times mentioned, it shall be lawful for Callow and he is hereby fully

(1) By the Customs and Inland Revenue Duties Act, 32 & 33 Vict. c. 14, s. 27, every person who shall . . . . keep any carriage . . . . without having a proper licence under this Act . . . . shall forfeit the penalty of 20*l.*

By 38 Vict. c. 23, s. 11, every person who shall let any carriage for hire for any period less than one year, shall for the purposes of the said Act (32 & 33 Vict. c. 14), be deemed to be the person keeping such carriage, and every person who shall hire any carriage for a year or any longer period, shall for the purpose of the Act be deemed to be the person keeping such carriage.

1877

BARBER v. CALLOW.

authorized to seize and obtain possession of the said clarence cabs, and this agreement shall be his full authority for so doing; and the cabs must not be sold until paid for by Rutter."

On the part of the appellant it was contended that under the agreement the letting for hire of the carriages was for a period less than a year, that is to say, for a week and so on from week to week, coupled with an agreement to sell the carriages in certain events which might or might not happen, and on payment of a sum of money for the purchase; and accordingly the person who let the carriages was, under the provisions of s. 11 of the Customs and Inland Revenue Act, 1875 (38 & 39 Vict. c. 23), to be deemed for the purpose of the Act of 32 & 33 Vict. c. 14, to be the person keeping the carriage.

On the part of the respondent it was contended that the carriages in question had under the agreement been sold to Rutter, the purchase-money being paid by way of instalments, and the purchase being subject to a proviso that the respondent might, on non-payment of certain instalments of the purchase-money, seize and re-possess himself of the carriages, and that on the 12th of October, 1876, the carriages were the property and in the possession of Rutter. It was further contended on the part of the respondent that, if the agreement disclosed a hiring and not a sale, such hiring was for a longer period than a year, and that therefore the respondent had not committed a breach of the first-named Act.

The magistrate, being of opinion that the respondent was right in his contention, dismissed the information.

The question for the Court was, whether on the 12th of October, 1876, the respondent had let the carriages for a period less than a year, within the meaning of the Act.

*C. S. Bowen*, for the appellant. Under the agreement set out in the case, the carriages in question were let to Rutter for a period less than one year, viz. for a week and so on from week to week. No interest for a year is created in Rutter, but only a possibility of interest.

*Robertson*, for the respondent. The agreement is in substance

1877

BARBER v. CALLOW.

a sale of the carriages, the purchase-money to be paid by instalments. So long as the instalments were duly paid, the vendor had no control over the subject of sale.

*Bowen*, in reply. The transaction was not a sale: no property was to pass until the seventy-five weekly instalments and the additional 5*l.* were paid.

LORD COLERIDGE, C.J. This agreement is very inartistically drawn, and it is not easy to construe it so as to give effect to every part of it. It is in substance an agreement for the sale of the carriages for 117*l.* 10*s.*, payable by seventy-five weekly instalments of 30*s.* with an additional sum of 5*l.* By no reasonable construction can it be said to be a letting for a less period than a year. It is unnecessary to decide whether or not Rutter has hired the carriages for a year: it is enough to say that Callow has not let them for less than a year.

GROVE, J. I am of the same opinion. The onus lies on the appellant to prove a letting for a period less than one year. This agreement does not make out such a letting. Callow was to have power to re-take the possession of the carriages in the event of Rutter making default in payment of the instalments: but at all events it was in the power of Rutter to keep them for seventy-five weeks, provided he made no such default. However difficult it may be to put a sensible construction upon every part of the agreement, it clearly is not a letting "for any period less than one year."

*Judgment for the respondent.*

Solicitor for appellant: *Solicitor for Inland Revenue.*
Solicitor for respondent: *W. Bohm.*

1877

April 27.

## CALDOW *v.* PIXELL.

*Ecclesiastical Dilapidations Act*, 1871 (34 & 35 *Vict. c.* 43), *s.* 29—*Construction of Statute—Directory or Imperative—Ecclesiastical Dilapidations—Direction of Bishop to Surveyor to inspect and report more than Three Months after Avoidance of Benefice.*

By the Ecclesiastical Dilapidations Act, 1871, s. 29, "within three calendar months after the avoidance of any benefice . . . . the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable":—

*Held*, that the provision as to the time within which the bishop is to direct the surveyor to inspect and report upon the buildings of a benefice after its avoidance is directory only, and not imperative; and that a direction to inspect and report made by a bishop more than three months after the avoidance of a benefice may be valid.

SPECIAL CASE stated pursuant to a master's order.

The action was brought to recover the sum of 117*l.* 16*s.* 6*d.*, for dilapidations in respect of the benefice of Skirwith, in the diocese of Carlisle, of which the plaintiff was the new incumbent, and the defendant the late incumbent. The defendant resigned the benefice on the 3rd of July, 1874, and the plaintiff was admitted thereto on the 6th of January, 1875. The bishop, on the 10th of November, 1874, more than three months after the avoidance of the benefice by the defendant's resignation, directed the surveyor of ecclesiastical dilapidations for the diocese to inspect the buildings of the benefice, and to report what sum was required to make good the dilapidations. The surveyor accordingly inspected the buildings, and made a report to the bishop stating that the aforesaid sum of 117*l.* 16*s.* 6*d.* was required to make good the dilapidations to which the defendant was liable. On the 31st of March the bishop made an order stating that sum as the sum for which the defendant, as the late incumbent of the benefice, was liable. The defendant declined to pay the amount, on the ground that the order was bad, by reason of the lapse of more than three months between the times of his resignation and of the direction to inspect.

The question for the Court was whether the plaintiff was

entitled to recover from the defendant by virtue of the order the said sum of 117*l.* 16*s.* 6*d.*

April 26, 27. *F. W. Gibbs*, for the plaintiff. The question to be determined is whether it is imperative that the direction to inspect and report shall be given within the limit of three months mentioned in the Ecclesiastical Dilapidations Act, 1871, s. 29 (1); it was noticed, but not decided, in *Gleaves* v. *Marriner*. (2) The effect of the statute was much discussed in *Wright* v. *Davies* (3), and it is plain from the decision in that case that the legislature did not intend to limit the right to sue, but merely to provide a better machinery: and it would be inconsistent with that intention to hold that the remedy of the new incumbent is taken away by the default of the bishop, when no such limitation upon his right to sue existed under the former law. The effect of holding the period of three months to be imperative is to cast upon the plaintiff the cost of all the repairs.

The primary object of the legislature was that the buildings of a benefice should be kept in repair; this object may be defeated if s. 29 be imperative, and therefore it ought to be construed as only directory: *Re a Coroner for Stafford*. (4) The delay in ordering the surveyor to inspect and report was occasioned by the

(1) By the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 29, "within three calendar months after the avoidance of any benefice . . . the bishop shall direct the surveyor, who shall inspect the buildings of such benefice and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable."

Sect. 31. "The report shall state what works, if any, are, in the opinion of the surveyor, needed, . . . . and shall state what sum, in the opinion of the surveyor, will be required to make good the dilapidations."

Sect. 34. "The bishop shall, . . . . after consideration of the whole matter, make an order, stating the repairs and their cost, for which the late incumbent, his executors or administrators, is or are liable."

Sect. 36. "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity."

Sect. 53. "No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this Act, and to which this Act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of this Act."

(2) 1 Ex. D. 107.

(3) 1 C. P. D. 638.

(4) 2 Russ. 475, at p. 483, per Abbott, C.J.

1877

CALDOW v. PIXELL.

default of a person to whom was committed the discharge of a public duty, and this is a further reason for holding that the statute is not imperative: *Rex* v. *Sparrow* (1), explained in *Rex* v. *Loxdale* (2); *Rex* v. *Justices of Denbighshire* (3); *Rex* v. *Mayor of Norwich* (4); *Mayor of Rochester* v. *Reg.* (5); *Reg.* v. *Ingall.* (6)

*Stavely Hill, Q.C.* (*John Edge* with him), for the defendant. Even under the former law the Statute of Limitations might become a bar to the right of a new incumbent to sue; and the amount to be recovered for dilapidations became less if a delay took place in bringing the action: Cripps's Law of the Church and Clergy, p. 318; therefore no reason deduced from the analogy of the former law exists for holding that the legislature intended the provision as to time in s. 29 to be directory. When a statute enacts that an act may be done for the benefit of an individual within a limited time, the act must be done within that specified time; and that principle applies here, for the main object of the Ecclesiastical Dilapidations Act, 1871, was to provide for the benefit of a new incumbent. The authorities cited for the plaintiff are not in point, for they relate to acts done for the benefit of the public in execution of statutory powers. The procedure created by any statute relating to the Established Church must be rigidly followed in all its incidents: *Vaux* v. *Vollans* (7); *Howard* v. *Bodington.* (8) Where an act is to be done by a court held at a specified time, it cannot be done by a court held at a subsequent time: *Bowman* v. *Blyth.* (9)

[DENMAN, J. The real question in *Bowman* v. *Blyth* (9) was as to the power of a court of quarter sessions to adjourn to a subsequent sitting the consideration of a matter, which they were directed by statute to determine on a specified occasion; this is pointed out by Mellor, J., in *Lewis* v. *Davis.* (10)

LOPES, J. In some of the authorities cited for the plaintiff the

(1) 2 Str. 1123.
(2) 1 Burr. 445, at pp. 447, 449, 450.
(3) 4 East, 142.
(4) 1 B. & Ad. 310.
(5) E. B. & E. 1024; 27 L. J. (Q.B.) 434.
(6) 2 Q. B. D. 199.
(7) 4 B. & Ad. 525.
(8) 2 P. D. 203.
(9) 7 E. & B. 26; 26 L. J. (M.C.) 57; in Ex. Ch. 7 E. & B. 47; 27 L. J. (M.C.) 21.
(10) Law Rep. 10 Ex. 86, at p. 91.

decision turned upon the question of convenience. *Reg.* v. *Ingall* (1) is, in my opinion, very much in point for the facts before us, and in that case the judges of the Queen's Bench Division seem to have struck a balance between the inconvenience of holding a statute to be imperative and the risk of allowing injury to be done by holding it to be directory.]

*Reg.* v. *Ingall* (1) was really decided upon the ground that the appellants had not been damnified, for they had obtained all the redress which they could have gained if there had been no delay. If the period of three months mentioned in s. 29 may be exceeded, a direction to inspect and report may be made at any time, however distant after the avoidance of a benefice; and it follows, that if a direction be made even one day after the expiration of that period it will be bad; in the present case the direction to inspect and report was made more than four months after the avoidance, and therefore the order of the bishop will not sustain the action.

Further, s. 53, which takes away the old remedy, shews that the new machinery must be strictly followed.

*Gibbs*, did not reply.

DENMAN, J. In my opinion the plaintiff is entitled to our judgment. The question raised in this case is that thrown out in *Gleaves* v. *Marriner* (2), but not there decided; it was briefly alluded to by Bramwell and Amphlett, B.B. (p. 109); they certainly expressed no definite opinion, but they appeared to entertain doubts whether the limitation of three months is imperative as regards the bishop. It was held in *Gleaves* v. *Marriner* (2) that the statute did not fix a time within which the surveyor is to inspect and report; but it has been argued before us on behalf of the defendant that if the bishop does not direct the surveyor within the three months, no order can be made under the statute against the late incumbent; and it has been contended that the delay of even one day after the expiration of the three months will make the order by the bishop invalid. Our attention has been called to s. 53, as shewing that the order upon which the plaintiff relies will not support the present action. But I think

(1) 2 Q. B. D. 199. (2) 1 Ex. D. 107.

1877

CALDOW v. PIXELL.

that this is too stringent a construction of the words in that section "under the provisions of this Act." Many decisions are to be found in which emphatic words such as "acts done in pursuance of this Act," or "acts under the authority of this Act," have been held to justify acts done not in strict compliance with the terms of a statute, but done with a bonâ fide intention of carrying out its provisions. The principle of these cases seems to apply here, and I therefore think that s. 53 is not fatal to the plaintiff's case.

I will now return to s. 29, and I may say that the rules for ascertaining whether the provisions of a statute are directory or imperative are very well stated in Maxwell On the Interpretation of Statutes: thus, at pp. 330, 331, it is laid down that the scope and object of a statute are the only guides in determining whether its provisions are directory or imperative, and the judgment of Lord Campbell in *Liverpool Borough Bank* v. *Turner* (1) is cited in support of this proposition; at pp. 333, 337, the distinction between statutes creating public duties and those conferring private rights is pointed out, and it is stated that in general the provisions of the former are directory, but of the latter imperative; and at p. 340 it is laid down that in the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. Upon applying the principles here set forth I come to the conclusion that s. 29 is to be construed as directory and not as imperative. The statute did not confer for the first time the power to sue for dilapidations; the right had previously existed for the benefit of the incumbent, but the legislature thought fit to modify this right by empowering a new incumbent to bring an action of debt on behalf of himself and the benefice. The statute imposes a public duty upon the bishop, it does not create a power or privilege for the benefit of the new incumbent as a private person. The bishop probably from inadvertence failed to give the direction within the specified time; but as this was an omission to perform a public duty, I think we ought to hold this statute to be directory.

Upon another ground it seems to me that the plaintiff is entitled to succeed, and that is, the question of convenience. The whole

(1) 2 De G. F. & J. 502; 30 L. J. (Ch.) 379.

scope and object of the Act must be looked at, and then it will be seen that great inconvenience may be occasioned and great injustice may be done, if the period of three months can in no case be extended; in that event if the bishop allowed one day to go by, the late incumbent would escape all liability, although very serious dilapidations might exist in the buildings of the benefice. The default of a public officer in the discharge of the duty committed to him might defeat the object of the statute. All cases cited on behalf of the plaintiff as to the non-appointment of a public officer are open to this observation, that in them by the failure to appoint an injury was inflicted upon many persons; here the injury was, at least in the first instance, inflicted upon one person only, the defendant; but although these cases may not go the full length necessary to enable the plaintiff to succeed, yet not one of them lays down that it is a material question whether the failure to perform a public duty affects a greater or less number of persons. I therefore think them the same in principle with the present. *Howard* v. *Bodington* (1) appears to be most in favour of the defendant, but it is clearly distinguishable; there the suit was of a criminal nature, and as the defendant did not appear it was necessary to shew that he had received a copy of the representation against him within the limited time; it was held that as the limited time had been exceeded the suit failed. I do not think, however, that the principle applies here, as in that case the proceedings were of a penal nature. Upon the same ground I think that *Vaux* v. *Vollans* (2) is distinguishable. These two authorities, therefore, are not really in point for the defendant. The cases cited before us establish that, where a public officer is directed by a statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms. For these reasons I think that the plaintiff is entitled to judgment.

LOPES, J. The question which has been discussed before us is of some importance, but after weighing the arguments upon each

(1) 2 P. D. 203. (2) 4 B. & Ad. 525.

1877

CALDOW v. PIXELL.

side I think that the plaintiff is entitled to succeed. I need not repeat the reasons which have been assigned by my Brother Denman, and it is necessary only to say that our decision must depend upon whether the legislature has made it essential for the bishop to give the direction to the surveyor within the prescribed period of three months. [The learned judge read the words of s. 29.] In construing the statute we must strike a balance between the inconvenience of holding the direction of the bishop and the proceedings subsequent thereto to be null and void, and the inconvenience of giving effect to the direction when it has been made after the prescribed time. It seems to me that the more objectionable course is to construe the statute as imperative, for by so doing the defendant, from no default of the plaintiff, would escape from the payment of a sum which he omitted to expend in keeping the buildings of the benefice in repair. I therefore think that the provision as to the time mentioned in s. 29 is directory only and not imperative.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Gray & Mounsey, for Mounsey & Co., Carlisle.*

Solicitors for defendant: *Miller & Smith, for Thorne, Smith, & Thorne, Wolverhampton.*

---

*June* 15.

COGGINS, APPELLANT; BENNETT, RESPONDENT.

*Incroachment on Highway*—27 & 28 *Vict.* c. 101, *s.* 51—*Limitation of Time for Information*—11 & 12 *Vict.* c. 43, *s.* 11.

Under 27 & 28 Vict. c. 101, s. 51,—which enacts that if any person shall incroach by making or causing to be made any building or fence on the side of any carriage-way within fifteen feet from the centre thereof, he shall be subject to a penalty not exceeding 40*s.*,—the incroachment is not a continuing offence, and the six months' limitation created by 11 & 12 Vict. c. 43, s. 11, commences from the completion of such building or fence.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions at Deddington, Oxfordshire, an information preferred by Peter Bennett, the surveyor of the Wooton highway district (the respondent), against Richard Coggins (the appellant),

under s. 51 of 27 & 28 Vict. c. 101 (1), charging that the appellant, on the 1st of November, 1876, at the parish of Staple Ashton, Oxfordshire, did unlawfully incroach by making or causing to be made a certain fence on a carriage-way or cart-way there, within fifteen feet from the centre thereof, contrary to the statute, &c., was heard on the 16th of March, 1877, and the appellant convicted.

It was proved that the appellant, who had property fronting the highway, had removed the old boundary wall of his premises, and had substituted for it an iron fence, which iron fence he had placed beyond the boundary of his property and within the distance of fifteen feet from the centre of the carriage-way there, thereby causing an incroachment upon ground which had theretofore been actually and uninterruptedly used as a highway for many years.

It was also proved that the erection of the fence in question commenced in July, 1876; and the informant, on cross-examination by the appellant's solicitor, stated his belief that it was finished in that month. It was proved, however, that the informant immediately upon seeing the incroachment cautioned the appellant's agent, and afterwards saw the appellant in person, who replied to his remonstrance: "If I am doing wrong, I will put it right;" that the informant subsequently, in October, after the matter had been brought to the knowledge of the highway board, communicated by their direction with the appellant again, but did not receive his final answer until December, when the appellant said he should not alter it.

On the part of the appellant the objection was taken, that the offence was not a continuing offence, and, the incroachment having been completed on the 22nd of July, 1876, and the information not having been laid till the 2nd of March, 1877, it was not laid within the limit of six months required by 11 & 12 Vict. c. 43, s. 11.

The justices were of opinion that the highway board had power

(1) 27 & 28 Vict. c. 101, s. 51: If any person shall incroach by making or causing to be made any building or pit or hedge, ditch, or other fence . . . . on the side or sides of any carriage-way or cart-way within fifteen feet of the centre thereof . . . . he shall be subject on conviction for every such offence to any sum not exceeding 40s.

1877

COGGINS v. BENNETT.

to allow or disallow the incroachment by the appellant, and that, after the notice given by the board and the reply of the appellant that, "if he was doing wrong, he would put it right," the matter of the information remained a continuing matter of information down to the time when the appellant declared, in December, that the fence should remain where it was then placed, in contravention of the notice of the highway board; and that from that time only was the subject-matter of the information complete: and, with this view, they did not consider that the matter of the information was barred by time; and they gave their determination against the appellant in manner above stated.

The question for the opinion of the Court was, whether the information was laid within the time contemplated by the Act.

*Waddy, Q.C.* (*Jelf* with him), for the appellant. *Ranking* v. *Forbes* (1), which arose upon the same clause of the same statute, and upon precisely the same state of facts, is in point. It was there distinctly held that, if an incroachment be made upon a highway by erecting a fence within fifteen feet from the centre thereof, the penalty must be proceeded for under 27 & 28 Vict. c. 101, s. 51, within six months after the erection of the fence, and it is not a continuing offence. Here, assuming that the erection of the fence was completed on the 22nd of July, 1876, the six months' limitation would expire on the 22nd of January, 1877, and it is too late for the board to avail themselves of their summary remedy.

*Philbrick, Q.C.* (*Lord* with him), for the respondent. The case cited is not binding on the Court, as there was no appeal. The words of s. 51 (2) are, "if any person shall incroach by making or causing to be made any building or pit or hedge, ditch, or other fence, &c." The offence is, not the erection of the fence, but the incroachment by making or causing the obstruction. So long as the fence remains unlawfully there, there is an incroachment on the highway. No reasons are given for the judgment in the case cited; nor is it found reported elsewhere: it is only to be followed, therefore, if the Court are prepared to agree with the principle it lays down.

(1) 34 Just. of Peace, 486.

(2) Which is, with some variation, a re-enactment of s. 69 of 5 & 6 Wm. 4, c. 50.

1877

COGGINS v. BENNETT.

LORD COLERIDGE, C.J. I am of opinion that the conviction in this case must be reversed. Apart from the decision of the Court of Queen's Bench in *Ranking* v. *Forbes* (1), I should have come to the same conclusion. Sect. 51 of 27 & 28 Vict. c. 101, enacts that, if any person shall incroach by making a hedge or fence on the side of any carriage-way, &c., within fifteen feet from the centre thereof, he shall on conviction be subject to a penalty. It has been suggested that Mr. Waddy's construction obliges us to reject the word "incroach;" but Mr. Philbrick's contention would oblige us to reject all the words by which the incroachment is described. It appears to me that what the legislature contemplated was, some single definite act which when done should be the subject of a remedy in this summary way. The matter of the complaint, within the meaning of s. 11 of 11 & 12 Vict. c. 43, arises when the party incroaches by making the fence; and the information must be laid within six months from that time. If it were not so, great hardship might arise; the incroacher might by undue delay in preferring the charge against him be deprived of the evidence which would have justified his incroachment. The object of the legislature evidently was that, if the board chose to resort to this summary mode of proceeding, they must come within six months; but, if they allow that time to go by, they must proceed in the ordinary way, by indictment.

GROVE, J. I am of the same opinion, and will only add one remark. The respondent's contention practically ignores the 11th section of 11 & 12 Vict. c. 43 altogether; it leaves no terminus à quo for the period of limitation.

DENMAN, J. I am entirely of the same opinion. The case of *Ranking* v. *Forbes* (1) was in my opinion rightly decided. I will only add that the information itself charges the incroachment "by making or causing to be made a certain fence on a certain carriage-way," not the continuing it. The conviction must be reversed.

*Judgment for the appellant.*

Solicitors for appellant: *Mackeson, Taylor, & Arnould.*
Solicitors for respondent: *White & Son.*

(1) 34 Just. of Peace, 486.

1877
*June* 28.

SIDDONS AND ANOTHER *v.* SHORT, HARLEY, & Co., AND OTHERS.

*Sale of Land—Implied Covenant for Adjacent and Subjacent Support—Injunction to restrain Acts calculated to endanger.*

The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant.

A. sold land to B. for the purpose of an iron-foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability :—

*Held*, ground for an injunction against A. and C., although no actual damage had been sustained by B.

CLAIM stating that the plaintiffs were iron-founders carrying on business in partnership at West Bromwich, Staffordshire, and, in the commencement of 1876, were desirous of erecting an iron-foundry and other buildings for the purpose of their business.

2. The defendants James and Isaac Whitehouse were then the owners of a piece of land of about nine acres situate at Harvells Hawthorn, West Bromwich, and on which buildings were then standing, and of lands adjoining thereto, under both which pieces of land were mines of coal and other minerals which had, as the said defendants then well knew, been partially gotten.

3. The plaintiffs applied to the defendants for the sale to them by the defendants of the piece of land of nine acres, for the purpose of erecting thereon the said works and buildings, and informed the said defendants of the purpose for which they required the same: and it was at the time of the sale and conveyance of the land hereinafter mentioned fully known to the said defendants that the plaintiffs required the land for the purpose of erecting thereon an iron-foundry and other buildings connected therewith.

4. On the 23rd of February, 1876, the defendants conveyed to the plaintiffs in fee-simple the piece of land of nine acres together with the buildings thereon.

5. The plaintiffs thereupon commenced the erection of the iron-

foundry and buildings on the land so conveyed to them; and had previously to October, 1876, erected a considerable portion thereof, but had not yet completed the same.

6. There was in the adjoining land an ungotten portion of a seam of thick coal. It was necessary for the support of the land of the plaintiffs that the mines and minerals in the adjoining land should not be worked and gotten at all within a distance of fifty yards at least from the boundary of the plaintiffs' land; and in particular it was necessary for the purpose that no part of the ungotten portion of the seam of thick coal should be worked and gotten within the said distance; and, if any part of the mines and minerals, and in particular if any part of the thick coal was worked and gotten within this distance, the land of the plaintiffs would subside, and the buildings thereon be cracked, injured, and destroyed, and the plaintiffs' business interrupted and injured.

7. The land would so subside as aforesaid although no buildings were placed thereon; but, if otherwise, the plaintiffs allege that under the circumstances they are notwithstanding entitled to necessary support from the adjoining land for the said land and the buildings which they have erected and are about to erect thereon.

8. In or about the 11th of November, 1876, the defendants Whitehouse let to the other defendants, Short, Harley, & Co., for a term of three years from the 4th of November, 1876, a part of the ungotten mines and other minerals situate within fifty yards of the plaintiffs' boundary, including the ungotten portion of the seam of thick coal situate within the said distance, with the right to get and raise the same.

9. The plaintiffs, before the granting of the lease, remonstrated with the defendants Whitehouse, and with the defendants Short, Harley, & Co., and objected to their proceeding to work and get the mines and minerals; but the defendants Short, Harley, & Co., nevertheless, with the sanction and licence of the defendants Whitehouse, and under the said tenancy, proceeded to drive gateroads for the purpose of getting the minerals, and have in fact driven the same within the said distance of fifty yards, and were before the commencement of this action about to work and

1877

SIDDONS v. SHORT.

get the mines and minerals, and particularly the thick coal within the distance of fifty yards.

10. Shortly after the commencement of this action a fire broke out in the Warr Hill Colliery, from the pit of which the workings were being carried on, and the same were necessarily and have been since stopped and suspended; but the defendants respectively threaten and intend to re-commence and continue the workings, and to suffer and permit the same to be re-commenced and continued when and as soon as it shall become possible to work in the pit, and also to proceed to work and get and to permit to be worked and gotten the mines and minerals, and in particular the thick coal, within the distance of fifty yards.

The plaintiffs claim an injunction to restrain the defendants Short, Harley, & Co., their agents and workmen, from working mines of coal or other minerals adjacent or near to the plaintiffs' land and premises, in such a manner as to cause any subsidence or alteration of the surface of the plaintiffs' land, or of the buildings that now are or that may be hereafter erected thereon by the plaintiffs for the purpose of their business, and from working any such mines or minerals within fifty yards of the plaintiffs' land.

And to restrain the defendants James and Isaac Whitehouse from working or allowing to be worked by themselves, their lessees, tenants, agents, or workmen, the mines of coal or other minerals adjacent or near to the plaintiffs' land and premises, in such a manner as to cause any subsidence or alteration of the surface of the plaintiffs' land, or of the buildings that now are or that may be erected thereon by the plaintiffs for the purpose of their business, and from working or allowing to be worked by themselves, their lessees, tenants, agents, or workmen, any such mines or minerals within fifty yards of the plaintiffs' land. Demurrer.

*Griffits, Q.C.* (*Arundel Rogers* with him), in support of the demurrer. The statement of claim does not disclose enough to warrant an absolute injunction at once and before any actual damage is done. In *Smith* v. *Thackerah* (1) it is laid down that the right of the owner of land to the lateral support of his neigh-

(1) Law Rep. 1 C. P. 564.

bour's land is not an absolute right, and the infringement of it is not a cause of action without appreciable damage. In *Pattison* v. *Gilford* (1) it was held that, in order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the plaintiff must shew that the act *must* result in a violation of such right. Jessel, M.R., adopting the dictum of Lord Cottenham, C., in *Emperor of Austria* v. *Day* (2): "The Court has jurisdiction by injunction to protect property from an act threatened, which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right; but, if the party applying is free from blame and promptly applies for relief, and shews that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted." Here, the statement neither discloses an appreciable damage nor that any damage is imminent; nor does it allege that the consequences which the plaintiffs apprehend might not be compensated in damages. At all events, the plaintiffs are not entitled to support for their buildings.

*Anstie*, contrà. The ground upon which the injunction is prayed here is, that the threatened proceedings of the defendants are in derogation of the grant of the land to them; and their claim is warranted by the several decisions of the House of Lords, in *Caledonian Ry. Co.* v. *Sprot* (3), *Elliott* v. *North Eastern Ry. Co.* (4), and *Great Western Ry. Co.* v. *Bennett.* (5) In the first it was held that a conveyance of land to a company for the purpose of constructing a railway gives the company a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and therefore that, although in the conveyance to the company the minerals are reserved, the grantor is not entitled to work them, even under his own land, in such a manner as to be calculated to endanger the railway: *Elliott* v. *North Eastern Ry. Co.* (4) was to the same effect. *Great Western Ry. Co.* v. *Bennett* (5) turned upon the construction of the Railways Clauses Consolidation Act, 1845 (8 & 9

(1) Law Rep. 18 Eq. 259, at p. 263.
(2) 3 D. F. & J. 217, 240.
(3) 2 Macq. 449.
(4) 10 H. L. C. 333.
(5) Law Rep. 2 H. L. 27.

1877

SIDDONS v. SHORT.

Vict. c. 20), and in no degree qualified the general principle laid down in the previous cases. *Smith* v. *Thackerah* (1) was a common law action before the passing of the Judicature Acts, which give Courts of law concurrent jurisdiction in this respect with the Court of Chancery. It is enough to entitle the plaintiffs to the injunction prayed, to shew reasonable grounds for apprehending damage from the threatened working by the defendants of the minerals: *Hext* v. *Gill.* (2)

*Griffits, Q.C.*, in reply. The cases cited have no application. They were all cases of the taking of land under a statutory authority for a specific purpose, viz. to construct a railway, and therefore a reservation or grant of a right to subjacent support might well be implied. Here, however, there can be no such implication: the parties have entered into specific covenants, and have not provided for adjacent or subjacent support for their land, still less for their buildings. At all events, before an injunction can be granted it must be shewn that the danger sought to be guarded against is imminent, or that some evident damage has been done.

GROVE, J. I am of opinion that a sufficient case for an injunction is disclosed on the statement of claim. Putting the buildings out of the question, the claim avers that land was conveyed to the plaintiffs, and that it is necessary for the support of their land that the mines and minerals in the adjoining land (which belonged to the grantors) should not be worked and gotten at all within a distance of fifty yards at least from the boundary of the plaintiffs' land, and that, if any part of the said mines and minerals be worked and gotten within that distance, the land of the plaintiffs will subside. It then goes on to allege that, after the grant of the land to them, the grantors leased to the other defendants a portion of the ungotten mines and other minerals situate within fifty yards of the plaintiffs' boundary, who with the sanction and licence of the grantors proceeded to drive gateroads for the purpose of getting the mines and minerals, and have in fact driven the same within the said distance of fifty yards. The injunction is sought quia timent, to restrain the defendants from working or

(1) Law Rep. 1 C. P. 564. (2) Law Rep. 7 Ch. 699.

allowing the mines to be worked near to the plaintiffs' land in such a manner as to cause any subsidence or alteration of the surface of the plaintiffs' land. To entitle them to succeed in this, they must make out a reasonable and probable case of injury to their land from the working of the mines. The claim shews a commencement of working and excavating, and a threat to continue it. It does not, it is true, shew any actual existing damage to the land. That, however, is not necessary: it is enough to shew a reasonable probability of damage. If the matter had depended upon the land alone, I think a sufficient case is disclosed to warrant the Court in granting an injunction. But it is said that there is no allegation that the damage apprehended is not of such a nature as to be capable of being satisfied by damages. I do not take that to be any ground for refusing an injunction. A man has a right to have the land as he bought it. If the apprehended damage be in its nature inconsiderable, the case may be different. Then, as to the buildings,—The inclination of my opinion is that the cases upon the subject go to this, that, where a man parts with land knowing that substantial buildings are intended to be erected upon it, he impliedly engages so to use his adjoining land as not to injure or interfere with those buildings. Upon both grounds, therefore, I think the demurrer must be overruled.

*Demurrer overruled.*

Solicitors for plaintiffs: *J. & F. Needham, for G. & A. Caddick, West Bromwich.*

Solicitors for defendants: *Rhodes & Son, for Seaman, Wednesbury.*

1877
*July* 12.

SHEPHERD AND OTHERS *v.* KOTTGEN AND OTHERS.

*Shipping—General Average—Sacrifice of Part of Vessel injured by Perils of the Seas and dangerous to whole Adventure—Mere possibility of saving injured Part—"Wreck."*

A claim for a general average contribution must receive a liberal construction; and therefore where a part of a vessel has been injured by the perils of the seas, and has thereby become dangerous to her and her cargo, the mere possibility of saving the injured part will be sufficient to render its sacrifice, for the purpose of saving the whole adventure, a general average loss; and, provided the injured part at the moment of sacrifice is of some value, the right to contribution arises, although it would probably have become at a subsequent time useless and of no value if it had been allowed to remain affixed to the vessel.

For the purposes of general average contingent wreck is not to be treated as actual wreck.

Whilst on a voyage to H. a vessel met with a storm, which caused parts of the rigging to give way; the mainmast in consequence began to lurch violently, and was cut away by the captain's orders for the purpose of preventing it from tearing up the vessel and sacrificing the whole adventure; the mast might possibly have been saved if the weather had moderated quickly; the vessel, having outlived the storm, was repaired at a port of refuge, and proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury whether at the time of sacrifice the mast was virtually a wreck and valueless; but he did not ask them to find whether, if the weather had moderated, the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere incumbrance:—

*Held*, a misdirection.

THE writ was issued on the 13th of August, 1875.

The declaration contained special and common counts for a general average loss incurred by the sacrifice of large portions of the plaintiffs' ship, her masts, rigging, tackle, and apparel, during a voyage from London to Hong Kong.

The only material plea was "never indebted," upon which issue was joined.

The cause came on for trial in London during the Hilary Sittings, 1877, before Manisty, J., and a special jury. It appeared that the plaintiffs' barque *Rollo* sailed from London with a general cargo, the defendants having shipped goods on board of her. Not many days after starting she met with a heavy gale, during which the mainmast was cut away, under the circumstances detailed in the

judgment; the *Rollo* then ran before the gale until the weather moderated. Ultimately she was towed by a steam vessel to Lisbon, where she was repaired; she afterwards proceeded on her voyage to Hong Kong, and there delivered her cargo.

The other facts are sufficiently stated in the judgment.

A verdict having been found for the defendants, a rule was obtained for a new trial, on the ground of misdirection, and on the further ground that there was no evidence to justify the verdict, and that the verdict was against the weight of evidence.

June 21, 23. *C. P. Butt, Q.C.*, and *J. C. Mathew*, shewed cause *J. A. McLeod* and *H. Sutton* supported the rule.

The arguments are sufficiently stated in the judgment.

*Cur. adv. vult.*

July 12. The judgment of the Court (Grove and Lopes, JJ.,) was delivered by

GROVE, J. This was an action by ship-owners against the owners of cargo,—really by the underwriters on the ship against the underwriters on the cargo.

The only question for our consideration was, whether the cutting away of a mast under the circumstances detailed in the evidence was a subject for general average contribution or not.

The evidence for the plaintiffs was mainly that of the captain of the ship *Rollo* and the first and second mates, taken on commission.

For the defendants four experts were called, who gave their evidence upon hearing that for the plaintiffs read. Some letters of the captain and the log were also put in: but these do not vary the evidence so far as it is material for our decision.

The vessel was bound for Hong Kong, and somewhere between Scilly and Lisbon she encountered a storm; portions of the rigging gave way, and from this cause the mainmast was, in the captain's language, lurching violently. He says "We wore the ship to try to save the mast. The mainmast was lurching violently. The mainmast would not break. We wanted it to break, for the simple reason that it was lurching so heavily that I was afraid it would open the ship out. I ordered the chief mate to cut away

1877

SHEPHERD v. KOTTGEN.

the port rigging so that it might fall to starboard clear of the ship. The mate obeyed my order." On cross-examination, he says,—"As soon as the starboard main rigging was gone, I knew the mast was gone, unless we could secure the starboard main-rigging. The whole difficulty was that the mast would not break. I was afraid the mast would break the ship out." Re-examined,—"The mast was lurching so much as to put the ship in danger of opening up." Question: "If the mast had not been lurching so much, could you have secured the mast?" Answer: "Yes."

The mate being asked, "Why did you want to cut the mast away?" says,—"To save the ship and cargo, and our lives, I should think. The mast was lurching about so violently, I expected it would rip up the decks. If the decks were ripped up, she (the ship) would fill with water." Cross-examined: "Some of the rigging had gone, and the ship was lurching violently. We thought, of course, then, that the mast would go, or, if it did not go, that it would rip up the decks."

The second mate says,—"The mast kept lurching: the rigging was ultimately cut away, and then the mast went over the side to starboard." Question: "Why was the port-rigging cut away?" Answer: "To let the mast go." Question: "Why did you want the mast to go?" Answer: "Because it would have torn the ship's deck; it would have opened her up." Cross-examined, he says,—"If it had broken off, it would have been a different thing altogether. We were afraid of its ripping up the decks . . . . I can't say if the mast would have gone whether we had cut the port-rigging or not. She might have got steadier afterwards. I decline to speculate on what might have occurred. I know that, if the mast had not gone, the ship would have opened out."

The expert called first for the defendant said that, under the circumstances described in the evidence for the plaintiffs, he would have described the mast as a wreck,—a gone mast. On cross-examination he said that, "if the mast had been lurched out of the ship, that would have been an extremely dangerous thing for the vessel."

The other experts give evidence much to the same effect,—one saying that "it (the mast) was an impediment to the adventure, and one that it was desirable in the interests of all to get rid of."

Another, on cross-examination, said that, if the weather had moderated, it might have been possible to have saved the mast, but difficult.

The substance of the evidence appears to us to be,—first, that, if the storm had continued, of which there was great probability, the mast would not have broken, but would have gone wholly overboard, tearing up the ship, and that in all probability the whole would have been lost,—secondly, that the mast might possibly have been saved if the weather had moderated quickly, but that this was very improbable,—thirdly, that the mast was cut away, not as a mere incumbrance, like a mast overboard and attached to the ship by rigging, but for the purpose of preventing its tearing up the ship and sacrificing the adventure.

The learned judge concluded his summing-up as follows :—"You must judge for yourselves, having regard to all the circumstances, the state of the weather, the state of the sea, the rigging gone, and all the circumstances as proved by the witnesses, and there is no evidence to contradict it. Are you of opinion that that mast was virtually a wreck and valueless and gone at the time it went over?"

The jury found that the mast was a wreck; and, in answer to a further question by the learned judge, "Do you find whether it was hopelessly lost?" "Yes."

The rule before us was obtained on the ground of misdirection, and that the verdict was against the weight of evidence.

The misdirection complained of was, that the judge did not ask the jury, as was done by Cleasby, B., in the case of *Corry* v. *Coulthard* (1), "whether, if the weather had moderated, the mast could possibly have been saved."

During the argument, another question occurred to us as having an important bearing upon this case, which was this, whether at the time the mast was cut away, the purpose for which it was cut away was to save the adventure by preventing the mast tearing up the ship, to which the evidence very strongly pointed, or whether it was cut away as wreck, as a mere incumbrance, or lumber.

This question was very much discussed by the Court of Appeal in *Corry* v. *Coulthard* (1), to which we shall presently refer.

(1) Not reported.

1877

SHEPHERD v. KOTTGEN.

We are of opinion that both the questions just alluded to should have been asked of the jury, that, although the learned judge does say to them, that, if the mast had not been cut away, it would have been very dangerous for the vessel, and that there was common danger to the ship and to the cargo, he does not put these as questions to the jury, but leaves to them only the question of whether the mast was virtually a wreck, and gone. He says, "As to putting to you whether, if the weather had moderated, it might have been saved in a storm amounting to a hurricane, or at all events a heavy gale, and the ship in the trough of the sea, and the weather not shewing any signs of improvement, to ask you whether, if the weather had moderated, the mast might have been saved, seems somewhat out of place in this case:" and he then puts the question which he repeats at the close of his summing-up.

We are further of opinion that, assuming the questions which we have stated to have been put to the jury, and the jury had found for the defendants, that finding would have been wrong and against the weight of evidence.

In our judgment, the beneficial objects of the doctrine and law of general average would be frittered away if, where a sacrifice is made, as seems obviously the case here, to save the whole adventure, the sharing the burden of such sacrifice could be made to depend upon nice questions of probability afterwards discussed, as to whether the thing might or might not have been saved.

In ordinary questions of general average, it is presupposed that great danger exists to the ship and cargo, and in those cases the probability is that the thing sacrificed would have gone with the whole venture, and therefore it would be the sacrifice of a probably valueless thing. Here, if the mast had gone, the ship would probably have gone with it. The ship was probably saved by the sacrifice of the mast. The evidence appears all one way on this point. The case differs in our judgment from those of cutting away wreck, as hypothetically put by Willes, J., in the case of *Johnson* v. *Chapman* (1), where he supposes a case of part of a mast going overboard, with spars and sails attached to it and hanging by a stay, battering and adding to the danger of a vessel. There the wreck is real, not anticipatory; and, as Willes, J., observes, "You cannot keep it; there is no intentional sacrifice

(1) 19 C. B. (N.S.) 563, at p. 582; 35 L. J. (C.P.) 23, at p. 28.

in cutting it away." Here, the mast was sound and entire as a mast; it was in its usual place, though lurching from the rigging being gone on one side.

It would defeat the main utility of general average, if, at a moment of emergency, the captain's mind were to hesitate as to saving the adventure, through fear of casting a burden on his owners. What was the pressing necessity here at the time of the act? The prevention of the ship being torn up and lost. "Wreck" is hardly an accurate term for contingent wreck. The making the potential the same as the actual, we cannot help thinking, will much embarrass the law on this subject; and the judgment of experts as to probabilities after the event is a very dangerous criterion for a jury to be guided by. The case of *Corry* v. *Coulthard* (1) is almost identical in facts with this case; indeed, in our judgment, it is identical in so far as the legal question is concerned. That case is not reported: but, by consent of counsel on both sides in this case, we have been furnished with the short-hand writer's notes of it. The Court of Appeal, consisting of the Lord Chief Justice of England, Sir B. Brett, and Sir R. Baggallay, gave no formal judgment; but their observations in the case on the motion by way of appeal from the Exchequer Division, are all one way, and wholly in point as to the present case. There, the mast (an iron one) becoming loose, the captain feared (though it turned out afterwards without cause) that it would go through the bottom of the ship, and he cut it away. The same contention was put forward there as here; but the jury found for the plaintiff, i.e. in favour of general average, Baron Cleasby asking them whether, if the weather had moderated, the mast could possibly have been saved. But the observations of the Court go much further than on the mere question whether the direction of the judge was right. The Lord Chief Justice says: "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into: it is enough if he exercise his judgment under all the circumstances. . . . . He must exercise his judgment. He cuts away the mast, not because

(1) Not reported. *Corry* v. *Coulthard* was heard in the Exchequer Division upon the 21st of December, 1876, and in the Court of Appeal upon the 17th of January, 1877.

1877

SHEPHERD v. KOTTGEN.

of its value as a mast, but because he thinks its condition is likely to be destructive of the vessel. . . . . If the danger is that the mast will perish at the same time that it causes the perishing of the ship, and it is cut away for the purpose of preventing peril to the ship and its own destruction, is not that general average? . . . . Whatever be the condition of the mast, it was a source of danger to the ship." The Lord Chief Justice says much more to the same effect.

Sir Baliol Brett says: "You do not mean to say it was so valueless that a man, in a calm, would have thrown it overboard: it was worth money. . . . . Wreck means rubbish, I suppose. . . . . If it is done for the benefit of the ship and cargo, then it is general average."

In the present case it appears to us the evidence is greatly preponderating, that the mast was cut away for the benefit of the ship, cargo, and crew, that it was not actual wreck, and was not cut away as such.

Mr. Phillips, a high authority on this subject, says, § 1271,—"If the thing abandoned is itself so exposed to destruction that it cannot possibly be retrieved and saved, and its abandonment cannot possibly contribute to the safety of the crew and ship, cargo, or freight, there may be ground of objection to contribution; but, in case of such objection, the construction will be very liberal in favour of contribution."

Being of opinion that the question of the mast being saved was put to the jury as one of probability, and not of possibility; that no question was left to them as to the purpose for which the mast was cut away; and that contingent wreck was treated by the judge as though it were actual wreck,—we think there should be a new trial. We also think that, although the learned judge is not dissatisfied with the verdict, yet that the verdict was against the weight of evidence, regarding the evidence from the point of view we have regarded it in this judgment.

*Rule absolute for a new trial.* (1)

Solicitors for plaintiffs: *Lewis & Watson.*

Solicitors for defendants: *Hollams, Son, & Coward.*

(1) Reversed on appeal Nov. 23.

[IN THE COURT OF APPEAL.]

1877
*Nov.* 23.

SHEPHERD AND OTHERS *v.* KOTTGEN AND OTHERS.

*Shipping—General Average—Part of Vessel injured by Perils of the Seas and dangerous to whole Adventure—Voluntary Destruction of useless Part of Adventure—"Sacrifice."*

Whilst on a voyage to H. a vessel met with a storm, which caused parts of the rigging to give way; the mainmast in consequence began to lurch violently, and was cut away by the captain's orders; if the mast had not been cut away, it would, in all probability, have fallen overboard in a few minutes, and in so doing might have torn up the decks and caused the vessel to founder; the vessel having outlived the storm, was repaired at a port of refuge, and proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury, whether at the time when the mast was cut away it was virtually a wreck and valueless; but he did not ask them to find whether if the weather had moderated the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere incumbrance:—

*Held*, reversing the decision of the Common Pleas Division, a proper direction.

THIS was an appeal by the defendants against a decision of the Common Pleas Division making absolute a rule for a new trial. The case is reported ante, p. 578, and the facts are stated in the judgment delivered by Grove, J., but owing to the view taken in the Court of Appeal as to evidence relating to the condition of the mast at the time when it was cut away, the following particulars were added:—

The first of the four experts called for the defendants stated that in his judgment it was impossible to repair the rigging so as to secure the mast, and that by cutting away the mast the captain accelerated its going overboard, "perhaps to the amount of a minute or two, not longer than that." The second stated that it was impossible to save the mast after the rigging was gone; the third stated that with the rigging gone the mast was "as good as a wreck;" that it was impossible to save it; that if the weather did not moderate it might be looked upon as likely to go over at any moment, and that there was no reasonable prospect of the weather moderating so as to enable the crew to repair the rigging; the fourth stated that there was no chance of saving the mast.

1877

SHEPHERD v. KOTTGEN.

Nov. 22, 23. *C. P. Butt, Q.C.*, and *J. C. Mathew*, for the defendants. It must be admitted that if, at the moment of cutting away the mast, there was any reasonable probability of saving it as part of the adventure, the plaintiffs would be entitled to contribution; but a claim to general average always assumes that the thing destroyed is capable of being saved; and here it is found by the jury that at the time of cutting away the mast it was a "wreck" and "hopelessly lost"; therefore as it was valueless, nothing was sacrificed, and the defendants are not bound to contribute. It is plain from the evidence that in all human probability the mast would have fallen overboard before any abatement of the gale could take place, and the distinction between probability and possibility cannot be relied upon. Suppose that a bale catches fire in the hold of a vessel laden with cotton; if it is left to burn the fire may and probably will extend to the rest of the cargo and even to the vessel, and the whole adventure may perish; but if the burning bale is thrown overboard to prevent further mischief the owner of it is not entitled to contribution, for it has ceased to be of value to him. Hardly any authority is to be found as to this question amongst the decisions of the English Courts; but a reference to text-books shews that, if at the moment when a thing is cut or cast away it must certainly perish, its intentional destruction by the act of the master is not the subject of general average: Benecke on Marine Insurance, ch. v. pp. 183, 184, 243 (1); Parsons on Marine Insurance, vol. 2, ch. v. p. 212, citing *Crockett* v. *Dodge* (2); *Slater* v. *Hayward R. Co.* (3); *Lee* v. *Grinnell.* (4) The mast of the plaintiffs' vessel was as much lost as if it had gone overboard and were hanging by a stay; and according to the view of the Court of Common Pleas in *Johnson* v. *Chapman* (5), cited in the judgment of the Common Pleas Division (ante, p. 582), no claim to general average can arise; and it is contended for the defendants that where a thing, which is cut away because it endangers the safety of the vessel, is in such a state that it must certainly perish, its destruction does not give

(1) But see Arnould on Marine Insurance, part 3, ch. 4, p. 816 (5th ed.); Maclachlan on Shipping, ch. 14, p. 608 (2nd ed.).

(2) 3 Fair. 190.

(3) 26 Conn. 128.

(4) 5 Duer. 400.

(5) 19 C. B. (N.S.) 563, at p. 582; 35 L. J. (C.P.) 23, at p. 28.

rise to a general average claim, although the rest of the adventure is saved. In the present case the captain ordered the mast to be cut away in the performance of his duty towards the shipowners; he was not then acting as agent on behalf of all parties interested in the adventure.

*A. Cohen, Q.C.*, and *J. A. McLeod* (*H. Sutton* with them), for the plaintiffs. According to the principles of general average, as they are understood in modern times, one of its chief objects is that in the hour of peril the master shall not be embarrassed by the consideration, what persons will be injured by the sacrifice of a particular portion of the adventure; he is to act as the agent of all persons interested in the vessel and her cargo; and therefore if he intentionally abandon or destroy anything for the benefit of the adventure, the owner of it will be entitled to contribution. Some views formerly held as to the nature of general average may not be quite consistent with this doctrine advanced on behalf of the plaintiffs, but they must be considered as now discarded. It is sufficient if, at the moment when the loss happens, the thing sacrificed has some value, and it is immaterial that it may soon become of no value. *Johnson* v. *Chapman* (1) affords a striking instance of the extent to which the right to general average has been carried; there a deck load of timber, by breaking adrift, obstructed the working of the pumps; a portion of it having been jettisoned, the owner was held to be entitled to contribution; and the ground of the decision was that the common peril, namely, the storm, was the cause of the deck-load becoming dangerous to the whole adventure. In the case suggested by the defendants' counsel, of a bale of cotton catching fire on board a ship, the danger arises from a special accident happening to the bale itself, and apart from the bale there is no peril common to the whole adventure. The principle of *Johnson* v. *Chapman* (1) applies here; for it was the gale which, by loosening the rigging, rendered it extremely probable that the mast, if not cut away, would cause the vessel to founder; if the storm had not been so severe, the rigging might have been forthwith repaired by the crew, and the mast might have been secured without injury. The plaintiffs contend that when a thing is voluntarily destroyed or abandoned,

(1) 19 C. B. (N.S.) 563; 35 L. J. (C.P.) 23.

1877

SHEPHERD v. KOTTGEN.

not by reason of an inherent or peculiar defect, but owing to a common peril, the right to contribution arises; and if this proposition be correct, the judge at the trial ought to have directed a verdict for the plaintiffs. *Corry* v. *Coulthard* (1) is directly in point for them. The right to general average must always receive a liberal construction: Phillips on Marine Insurance, vol. ii., par. 1271 (cited ante, p. 584).

[BRETT, L.J. The passage cited from Phillips has reference to the question, What is an imminent peril? It does not seem to me to apply to the present case, where the matter in dispute is the value of the thing destroyed at the moment of destruction.]

It is admitted on behalf of the plaintiffs, that no claim to contribution would arise if the mast had been so rotten that it would have been cut away in fine weather; but, upon the facts, what rendered the mast worthless was the storm, which was the common peril of the whole adventure. It is for the captain to determine what is best to be done, and if he acts bonâ fide, the exercise of his discretion ought not to be interfered with.

*J. C. Mathew* replied.

BRAMWELL, L.J. I think that this appeal must be allowed. The right question was left to the jury, and the verdict was supported by sufficient evidence, and when the judgment of the Common Pleas Division is examined, it will be found that there is no real difference as to the law between Grove, J., and Lopes, J., upon the one hand, and Manisty, J., upon the other; but that they misapprehended the effect of what he stated to the jury. They seem to have thought that he omitted to ask the jury whether it was possible to save the mast. I think he did ask that question, and that it was answered in the negative, for the jury said that the mast was "hopelessly lost." Upon the evidence, it is plain that the mast was in the course of destruction, and the only matter to be considered by those on board was in what manner its destruction should be completed. Lord Justice Brett has communicated to me the propositions which he intends to lay down in the course of his judgment, and I think that they will be of value for guidance in future cases of this sort. I wish, however,

(1) See ante, pp. 583, 584.

to put my own view shortly, in these terms: Where the thing destroyed has some peculiar condition attached to it, so that it will be lost whether the whole adventure is saved or not, then its destruction cannot be deemed a sacrifice. I think that this proposition applies to the present facts. The mast was in such a state that it must have been lost, whether the vessel got safely to port or not. Consequently there was no sacrifice of it when it was cut away, and the plaintiffs have no claim for contribution. In truth, the cause of the mast being lost was the giving way of the rigging, which in all probability had been imperfectly fitted. I very much agree with the view of the law taken by the judges of the Common Pleas Division; but differing from them as to their view of the direction to the jury, I think that the right question was put by Manisty, J., with very great precision.

BRETT, L.J. In my opinion the judge at the trial left the right question to the jury, and there was evidence upon which the jury might find for the defendants, and upon that finding no claim for general average can be maintained. Strange to say, the question before us is novel in the English courts. The definition of general average has often been discussed, and the incidents necessary to found a claim for contribution have often been enumerated; and it has been established that general average cannot exist without an intentional sacrifice, but the meaning of the word "sacrifice," and what is comprehended by it, have never before been thoroughly considered. The question before us arose, to a certain extent, in *Corry* v. *Coulthard* (1), but, owing to the finding of the jury in that case, it was not there necessary to define the meaning of the word "sacrifice" so nicely as it must be defined upon the present occasion.

Unless "possibility" means either a mathematical or scientific possibility, I entirely agree with Lord Justice Bramwell that the question left to the jury by Manisty, J., was really and substantially the question which the judges of the Common Pleas Division considered ought to have been asked of the jury; but in the ordinary occurrences of life "possibility" is never used in that sense, and is not so used in any part of maritime law. In

(1) See ante, pp. 583, 584.

1877

SHEPHERD v. KOTTGEN.

the present case the act, relied upon by the plaintiffs as the act of sacrifice, is the cutting of the port rigging in order to insure the immediate falling of the mast; and we have to determine whether the contention for the plaintiffs is correct.

I shall assume, for the purposes of my judgment, that the captain, when he ordered the port rigging to be cut away, did intend to sacrifice the mast for the benefit of both ship and cargo; and I shall not assume that he believed at that moment the mast to be absolutely lost, and that he cut it away only with the object of getting rid of it. Now, consistently with the decision of this Court in *Corry* v. *Coulthard* (1), and in accordance, as it seems to me, with what was intimated by the Court in that case, the following proposition may be stated: If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. Or the proposition may be stated in the following terms: Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice. Another form of stating the result of this proposition is to say that there is nothing in respect of which a general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner. Does this proposition apply here? It seems to me that the finding of the jury upon the question left to them must mean that at the time when the act relied upon was done, namely, when the port rigging was cut away in order to cause the mast to fall overboard, the mast could not be saved, not indeed by reason of any inherent defect, but owing to the violence of the gale, the giving way of the rigging, and the impossibility of the

(1) See ante, pp. 583, 584.

weather moderating so as to allow it to be repaired; the mast was necessarily lost, and must have been lost to its owners, whether the vessel should or should not be saved; or, in other words, that though the ship should outlive the storm, and though the mast should not be cut away, it would fall overboard and be lost in the space of a few minutes; there was no possibility, of which human foresight could take account, of the storm abating, so as to enable the mast to be secured, and the mast was lost whether it was or was not cut away. Under these circumstances it seems to me that there was no sacrifice of the mast, that the act relied upon caused no loss to the owners, and therefore that no claim for general average can be sustained.

I may add that what distinguishes this case from *Corry* v. *Coulthard* (1) is that there the jury found that it was possible to save the mast; it follows that in *Corry* v. *Coulthard* (1) the mast was of some value, and the facts of that case did not fall within the proposition which I have endeavoured to lay down.

COTTON, L.J. I am of opinion that there should be no new trial, and that this appeal must succeed. As I understand the finding of the jury, the mast, as distinguished from the vessel, was "hopelessly lost" at the time when the act relied upon as giving a claim for contribution took place. Now "hopelessly lost" must mean "impossible to be saved." In the language of every-day life a thing is impossible when, according to the ordinary course of human events, no expectation can be entertained that it will happen: and I think, upon the evidence, it is plain that no hope could be entertained of preserving the mast, for in all human probability, whether the vessel were saved or not, the mast would in a few moments have gone overboard. In fact, one of the experts says that what was done hastened the fall of the mast by one or two minutes, and no more. I do not think that this state of facts justifies a claim for contribution. The principle of general average may be thus stated; where part of a common adventure, by which I mean a ship and her cargo, is voluntarily abandoned or destroyed for the purpose of saving the whole, when the remainder, not abandoned or destroyed, is saved, it is equitable

(1) See ante, pp. 583, 584.

1877

SHEPHERD v. KOTTGEN.

that all those whose property is saved should contribute towards the loss of their co-adventurer, whose property has been abandoned or destroyed for the common benefit. But the property abandoned or destroyed must in all respects be considered in the same light as if it had been saved, and its value must be estimated accordingly; and it follows that where the thing said to have been voluntarily abandoned or destroyed is in such a state, by reason of a peril peculiar to itself, that if the act of supposed sacrifice had not been done, it would have very shortly been destroyed, without the rest of the common adventure being lost, the act of slightly hastening the moment of loss is not an act of sacrifice which enables the owner of the thing to claim contribution; there is no act of sacrifice if within a short time the thing would have been lost by a peril peculiar to itself, and independent of the common peril to which the whole adventure is exposed.

*Judgment reversed.*

Solicitors for plaintiffs: *Lewis & Watson.*
Solicitors for defendants: *Hollams, Son, & Coward.*

---

*June* 15.

CALLANDER *v.* HAWKINS.

*Practice — Costs on Confessing a Defence under Order XX., Rule* 3 *— Costs under Order LV.*

In an action for rent, and for damages for breach of covenant in not building a wall, and also claiming an injunction, the defendant paid money into court to satisfy the claim for rent, and pleaded performance of the covenant by building the wall after the commencement of the action, and paid into court 1*l.* in respect of the breach before action. The plaintiff took the money out of court, confessed "the defence" as to the wall, and claimed costs under Order XX., Rule 3:—

*Held*, that he was not entitled to such costs, for the statement did not amount to a "defence," within the meaning of that rule; but that he was entitled to the costs of the action under Order LV., or under the County Court Act, 15 & 16 Vict. c. 54, s. 4.

ACTIONS by lessor against lessee for rent, breaches of covenan to repair, &c.

The writ in the first action was issued on the 13th of December,

1877

CALLANDER v. HAWKINS.

1876, claiming 12*l.* 10*s.* for a quarter's rent due at Michaelmas, and damages for breaches of covenant. The defendant paid 12*l.* 10*s.* into court on the 20th. A second action was commenced on the 5th of February, 1877, for 12*l.* 10*s.*, a quarter's rent due at Christmas, 1876, and also claiming damages for breaches of covenant, and an injunction. On the 16th of February, 1877, an order was made at chambers to consolidate the actions. The plaintiff delivered a statement of claim on the 22nd of February, claiming the rent, and damages for breaches of covenant, amongst others, for not building a wall, and also an injunction. On the 28th the defendant paid into court a further sum of 12*l.* 1*s.* 8*d.* (being the amount of the second quarter's rent less property-tax). On the 25th of April an amended statement of defence was delivered, the fifth paragraph of which stated in substance that the defendant was before action from time to time prevented by the wrongful act of the owner of the adjoining land from maintaining the wall, but that on the 23rd of April, 1877, the wall was erected, and had since been maintained in accordance with the covenant, and the defendant paid 20*s.* into court in respect of the breaches. On the 18th of May the plaintiff replied, accepting the 12*l.* 10*s.*, 12*l.* 1*s.* 8*d.*, and 1*l.* in full satisfaction, and confessing the fifth paragraph of the defence. He thereupon signed judgment and claimed costs under Order XX., Rule 3, of the rules under the Judicature Act, 1875. (1) The master refused to tax the plaintiff's costs without an order of a judge, on the ground that the allegations confessed did not amount to a "defence," within the meaning of that rule, inasmuch as they set up performance after the commencement of the action, and therefore could only go to damages.

LINDLEY, J., on appeal, confirmed the master's refusal.

(1) Order XX., Rule 3: "Whenever any defendant in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence,—which confession may be in the form No. 2 in Appendix B. hereto, with such variations as circumstances may require,—and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order."

1877

CALLANDER v. HAWKINS.

*Maurice Powell* moved for an order that the plaintiff should have his costs taxed under Order LV. By the result of the action the plaintiff has recovered 25*l.* for rent, and 1*l.* for damages for breaches of covenant. Assuming, therefore, that the master was right in holding the reply not to be a confession of "a defence," within Order XX., Rule 3,—inasmuch as it only went to damages, still the plaintiff is entitled to the costs of the action. He could not have sued in the county court, because that court had no power to grant an injunction to restrain the continuance of the breach of covenant; and, in the absence of an order to the contrary, the plaintiff has an absolute right to costs, under Order LV. But he is entitled to costs under Order XX., Rule 3. The defendant pleads that he built the wall after the commencement of the action. If that is a defence against the claim for an injunction, surely the plaintiff was at liberty to confess it and to ask for costs under the rule: *Gale* v. *Ablett* (1) and *Cook* v. *Chilcott.* (2) But at all events, the plaintiff is entitled to costs under Order LV.: *Baker* v. *Oakes.* (3) After the consolidation of the two actions, the plaintiff's claim is to be considered as if the whole had been included in one action.

*Tindal Atkinson,* for the defendant, was requested to confine himself to the claim for costs under Order LV., or s. 4 of 15 & 16 Vict. c. 54. That point was not before the learned judge at chambers; and there are no sufficient materials to raise it here. For anything that appears, 1*l.* may have been the whole cost of building the wall; and the case was not one for an injunction: see Kerr on Injunctions, 495.

LORD COLERIDGE, C.J. This was an application to the master, after a statement of defence had been delivered, to tax the plaintiff's costs under Order XX., Rule 3, of the rules made pursuant to the Judicature Act, 1875. The real subject-matter of the action was a breach of covenant in not building a certain wall: the statement of defence admitted a breach, the wall not having been built until after the commencement of the action, and 20*s.* was paid into court to satisfy that breach. The plaintiff there-

(1) 8 Jur. (N.S.) 987. (2) 3 Ch. D. 695.
(3) 2 Q. B. D. 171.

1877

CALLANDER v. HAWKINS.

upon took the money out of court, and confessed "the defence," and applied to have his costs taxed. The master refused to tax, and my Brother Lindley on appeal confirmed the master's refusal. The objection was, that the matter so confessed did not amount to a defence, because it only went to damages, and therefore was not within the rule. I am of opinion that the master and my Brother Lindley were quite right; and, if the matter had rested there, I should not have interfered with my Brother Lindley's discretion. That was the only point which was before them. No application was made under Order LV., or under the County Court Act, 15 & 16 Vict. c. 54, s. 4. We must treat this as an application for costs made to us de novo: and it is now open to the plaintiff to apply for costs under the County Court Act or under Order LV. and s. 67 of the Judicature Act, 1875; and it is in our discretion to allow them. I think there is some force in the observation that this is a new application, and not an appeal from the decision at chambers, and that properly the Court ought to have had more materials to guide their discretion. But, upon the whole, I think it is an application which the plaintiff is entitled to make, and that we have materials enough before us for the purpose. It appears that two actions were brought for the recovery of rent; and in both actions the amount of rent was paid into court. The actions were consolidated. In the statement of claim there was a claim for damages for breach of covenant in not building a wall, to preserve the boundaries, and also a claim for an injunction. No doubt the defendant ought to have built the wall, and he has paid 20*s.* into court for his default. In consequence of the action the defendant has now built the wall. It appears therefore that throughout the proceedings the plaintiff has been in the right and the defendant in the wrong; and that what the latter has done he has done under pressure, and it is only reasonable that the plaintiff should have his costs. I think the plaintiff is entitled to the costs of the action, but not to the costs of the proceedings before the master or before my Brother Lindley, and that there should be no costs of this rule.

GROVE, J. I am of the same opinion, though not without some doubt as to the meaning of "ground of defence," in Order XX.,

1877

CALLANDER v. HAWKINS.

Rule 3. Upon the whole, however, I think the master was right, and that the rule merely contemplated a substantive ground of defence arising after the commencement of the action, and does not apply to a case like the present. As to the other point I entirely concur with my Lord. The action was substantially an action to try a right, and therefore a proper case for costs under the County Court Act and Order LV. incorporating the statutory provisions as to costs, as suggested in *Baker* v. *Oakes*. (1)

*Rule accordingly.*

Solicitors for plaintiff: *Drake & Son.*

Solicitor for defendant: *Henry Aird.*

(1) 2 Q. B. D. 171.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

# INDEX.


**AFFIDAVIT**—By plaintiff - - - 70
*See* PRACTICE. 9.

**AGENT** - - - - - 224
*See* FACTOR.

**AGREEMENT**—By way of wagering - 76
*See* WAGER.

**ALMS**—Disqualifying from voting - - 26
*See* PARLIAMENT. 1.

**ALTERATION**—Name of street - - 440
*See* MUNICIPAL ELECTION.

**APPEAL**—From order of judge at chambers 21
*See* PRACTICE. 1.

**ARBITRATION** or reference to justices - 410
*See* BUILDING SOCIETY.

**ATTACHMENT**—Of debts - - - 9
*See* PRACTICE. 4.

**AUTHORITY** - - - - - 151
*See* CHEQUE.

**BAILMENT**—Deposit of property in cloak-room
*See* RAILWAY COMPANY. [416

**BANKER** - - - - - 151
*See* CHEQUE.

**BANKRUPTCY**—*Annulment of Adjudication—Resolution to accept Composition—Rights of unsatisfied Execution-Creditor after Adjudication is annulled—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 28, 81.] T. recovered judgment against C. whose goods were seized by the sheriff under a writ of execution. C. thereupon filed a petition for liquidation, and an order was granted restraining the sheriff from selling. This order was afterwards discharged, and C. was adjudged bankrupt, but a fresh restraining order was granted under the bankruptcy. The sheriff then withdrew voluntarily. Afterwards the creditors of C. resolved under the Bankruptcy Act, 1869, s. 28, to accept a composition of 5*s.* in the pound upon "the debts proved and admitted in the bankruptcy;" they further resolved that the order of adjudication should be annulled forthwith, and

**BANKRUPTCY**—*continued.*

that the property of C. should be handed back to him. T. did not assent to the resolution. The Court of Bankruptcy affirmed the resolutions, and ordered the adjudication to be annulled. Afterwards under the same writ of execution, the sheriff again seized the goods of C. under the direction of T.:—*Held*, that under the Bankruptcy Act, 1869, s. 81, the property in C.'s goods reverted to him upon the annulment of his bankruptcy, that the resolutions were not binding upon T. who had neither assented to the composition nor proved under the bankruptcy, and that the seizure by the sheriff of C.'s goods after the annulment of his bankruptcy was lawful.—*Quære*, whether the seizure after the annulment would have been lawful if the composition had not been confined to "the debts proved and admitted in bankruptcy" and had extended to any debts "provable under the bankruptcy." CREW *v.* TERRY - - 403

2. —— *Composition under s.* 126 *of the Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71)—*Statement by the Debtor of Creditor's Claim.*] Upon composition proceedings under s. 126 of the Bankruptcy Act, 1869, the names of the plaintiffs were inserted in the statement of the debtor produced at the meetings, as "Creditors claiming to hold security," and the amount of their claim was stated to be 94,000*l.* To this was appended a note: "Under legal advice, this claim was resisted, and became the object of an action and reference, which reference is now pending."—After the resolutions accepting a composition had been passed the award was made by the arbitrator, by which he found for the plaintiffs in the action, with damages 40*s.*, and, as to the matters in difference, that a sum of 3320*l.* was due to the plaintiffs. The plaintiffs having brought an action on the award, the defendant set up the composition resolutions as a defence:—*Held*, reversing the judgment of the Common Pleas Division, that the above facts did not bring the case within s. 126, and consequently that the plaintiffs were not

**BANKRUPTCY**—*continued.*

barred from proceeding at law to recover the full sums awarded. Melhado and Lloyd *v.* Watson [C. A. 281

3. —— *Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 126—*Composition Resolutions— Debts provable — Contingent Liability — Description of Debt in Debtor's Statement.*] A debtor filed a petition under s. 126 of the Bankruptcy Act, 1869, which resulted in resolutions for a composition of 2*s.* in the pound, payable in one month from the registration. A. B. was inserted in the statement of debts and assets, under the name of A. B. & Co., as a creditor for a certain sum, and he proved for, voted in respect of, and received the dividend on, a larger sum. At the time of the petition A. B. was under liability, jointly with J. W., on a bail-bond which had been given by them to free the debtor's ship from arrest in a collision suit in the Court of Admiralty, but their liability on the bond was not inserted in the statement, and no claim against the debtor's estate was made in respect of it. After the dividend had been paid, the suit was decided against the debtor, and A. B. was called upon to pay under the bond:—*Held*, by the Common Pleas Division (Lord Coleridge, C.J., Grove and Denman, JJ.), that, inasmuch as the liability on the bail-bond was a "debt or liability" which, though contingent, was provable under s. 31 of the Act and Rule 270, the debtor was released from it by the composition resolutions.—But by the majority of the Court of Appeal (James, Baggallay, and Bramwell, L.JJ.), reversing this judgment, that A. B. was not bound as to this debt by the composition resolutions, the debt not having been inserted in the debtor's statement under s. 126, and A. B. not having voted in respect of this debt (Brett, L.J., dissenting, and agreeing with the Common Pleas Division). Wilson and Brown *v.* Breslauer - C. A. 314

4. —— *Liquidation by Arrangement—Absence of Notice of Proceedings to Creditors—Subsequent Promise to pay Debt barred by Bankruptcy*—32 & 33 *Vict. c.* 71, *ss.* 49, 127.] To a statement of defence, setting up that the defendant was discharged from the claim by an order of discharge obtained by him as the result of proceedings for liquidation by arrangement subsequent to the accrual of the claim, the plaintiffs replied that they had had no notice of the liquidation proceedings until long after they had been concluded, and that the defendant had not inserted the names of the plaintiffs as his creditors, or their debt in any list, statement, or document, forming any part of the proceedings, and that subsequently to the close of the proceedings the defendant had promised to pay the claim:—*Held*, a bad reply. Heather *v.* Webb [1

5. —— *Liquidation by Arrangement—Validity of Resolutions — Fraud — Jurisdiction of High Court — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 10, 12, 72, 125, 127—*Bankruptcy Rules*, 1870, *Rules* 289, 301.] The High Court of Justice has jurisdiction to inquire and decide whether fraud has been committed in the registration of resolutions for liquidation by arrangement under the Bankruptcy Act, 1869, ss. 125, 127; and therefore where in an action of debt the defendant pleads that he has liquidated his affairs by

**BANKRUPTCY**—*continued.*

arrangement and that the debt sued for is provable under the proceedings, the plaintiff is at liberty to reply and prove that the registration of the resolutions in the Court of Bankruptcy has been procured by fraud, and is therefore invalid. Eyre *v.* Smith - - - C. A. 435

**BILL OF EXCHANGE**—*Indorser—Notice of Dishonour.*] To a statement of defence, in an action against an indorser of a bill of exchange, setting up the absence of notice of dishonour, the plaintiff replied that neither at the time when the bill was drawn, nor afterwards, nor when it became due and on presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant, any effects of the defendant in his hands, and the said bill was drawn and accepted and indorsed by the defendant and the prior indorsers for the purpose of raising money for the defendant, the drawer, the acceptor, and the prior indorsers jointly, and the defendant was in no way damnified, even if there was no notice of dishonour:—*Held*, a bad reply. Foster *v.* Parker - 18

**BILL OF EXCHANGE ACT**—Procedure under 80
*See* Practice. 1.

**BILL OF LADING** - - - - 432
*See* Ship. 3.

**BILL OF SALE**—*Bills of Sale Act* (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Growing Crops not "Goods or other Articles capable of complete Transfer by Delivery."*] A document,—by which A. agrees to sell to B. "five acres of wheat now standing in, &c., at 6*l.* per acre, B. to cut and carry the corn any time he may require; and B. agrees to purchase the said five acres upon the above conditions,"—is a bill of sale within the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, as the intention is apparent to pass the immediate property.—Growing crops are not "personal chattels" within s. 1, which is defined by s. 7 to "mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery." Brantom *v.* Griffits [C. A. 212

**BIRDS PROTECTION ACT**—35 & 36 *Vict. c.* 78—39 & 40 *Vict. c.* 29—*Sale of Birds imported from Abroad.*] It is no defence to an information under the Wild Birds Protection Act, 1876 (39 & 40 Vict.), c. 29, for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom. Whitehead *v.* Smithers - - - - - 553

**BISHOP**—Direction of, to surveyor to report 562
*See* Dilapidations.

**BOROUGH**—Vote - - - - 26
*See* Parliament. 1.

**BUILDING SOCIETY**—6 & 7 *Wm.* 4, *c.* 32, *s.* 4—10 *Geo.* 4, *c.* 56, *s.* 27—*Action against Trustees by Retiring Member to recover Subscriptions—Reference to Arbitration or Justices—Exclusive Jurisdiction — Effect of Notice of Withdrawal.*] The defendants were trustees of a benefit building society, enrolled pursuant to 6 & 7 Wm. 4, c. 32, and the statement of claim alleged that the plaintiff became a member of the society, and was the holder of first-class shares, and during his membership paid his subscriptions, that by a rule of the society any member holding first-class

**BUILDING SOCIETY**—*continued.*
shares, desiring to withdraw from the society, should, after giving three months' notice, receive back the whole amount paid by him for subscriptions; that the plaintiff gave the requisite notice of withdrawal, and there then became due to him from the society the sum of 35*l.* 8*s.* 6*d.*, which the plaintiff was entitled to be paid according to the rule:—*Held*, upon demurrer, that the statement of claim was bad; for it alleged a dispute between a building society and a member thereof, and a rule must be assumed to exist referring disputes of that kind to arbitration or justices, pursuant to 10 Geo. 4, c. 56, s. 27, (incorporated by 6 & 7 Wm. 4, c. 32, s. 4), and the mere notice of withdrawal given and assented to would not prevent the application of the rule. HUCKLE *v.* WILSON - - - - - 410

**BURGESS ROLL** - - - - 440
*See* MUNICIPAL ELECTION.

**CARGO** - - - - - - - 163
*See* SHIP. 1.

**CARRIAGE**—Keeping without licence - 558
*See* INLAND REVENUE ACTS.

**CASES**—*Beeston* v. *Beeston* (1 Ex. D. 13) distinguished - - - - 76
*See* WAGER.

—— *Bridges* v. *North London Ry. Co.* (Law Rep. 7 H. L. 213) discussed - - 369
*See* NEGLIGENCE. 1.

—— *Bush* v. *Trowbridge Waterworks Co.* (Law. Rep. 19 Eq. 291; 10 Ch. 459) distinguished - - - - 99
*See* LANDS CLAUSES ACT.

—— *Corby* v. *Hill* (4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318) followed - - 308
*See* NEGLIGENCE. 3.

—— *Ferrand* v. *Corporation of Bradford* (21 Beav. 412) followed - - - 99
*See* LANDS CLAUSES ACT.

—— *Indermaur* v. *Dames* (Law Rep. 1 C. P. 274; and on appeal, Law Rep. 2 C. P. 311) followed - - - - 308
*See* NEGLIGENCE. 3.

—— *Reg.* v. *Keyn* (2 Ex. D. 63) followed - 173
*See* PRACTICE. 11.

**CESSER OF LIABILITY** - - - 247
*See* SHIP. 4.

**CHARGE FOR COSTS** - - - 362
*See* SOLICITOR AND CLIENT.

**CHARTERPARTY**—Cesser of liability 247, 465
*See* SHIP. 4, 5.

**CHEQUE**—*Banker—Order—Indorsement by Agent—Payment—Authority*—16 & 17 *Vict. c.* 59, *s.* 19.] An indorsement of a cheque payable to order, purporting to be by the agent of the person to whose order the cheque is payable, is, within 16 & 17 Vict. c. 59, s. 19, a sufficient authority to the banker to pay the amount of such cheque though the person who indorsed the cheque had no authority to indorse.—S. K., an agent of S. & Co., the plaintiffs, having authority to sell goods for them and to receive payment by cash or cheque, but not having authority to indorse cheques, received from the defendants, in payment for goods

**CHEQUE**—*continued.*
supplied, a cheque on their bankers drawn payable to S. & Co., or order. S. K. indorsed it "S. & Co., per S. K., agent," received the money from the bankers, and misappropriated part of it. The bankers returned the cheque to the defendants, and the amount was allowed in account by the defendants:—*Held*, affirming the decision of the Common Pleas Division, that such payment by the bankers was within the protection of 16 & 17 Vict. c. 59, s. 19; and that the plaintiffs could not maintain an action against the defendants, either for the price of the goods or for the cheque. CHARLES *v.* BLACKWELL - - C. A. 151

**CIRCUMSTANCES, SPECIAL** - - 430
*See* PRACTICE. 8.

**CLERICAL ERROR**—In lease - - 88
*See* CONSTRUCTION OF DEED.

**COAL MINES REGULATION ACT, 1872** (35 & 36 *Vict. c.* 76), *s.* 52—*Workmen employed in Mine with power to dismiss themselves at a Moment's Notice—Termination of Service*—"*Employed in or about the Works*"—*Special Rules.*] By the Coal Mines Regulation Act, 1872, s. 52, power is given to frame special rules for the conduct and guidance of the persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in the H. mine no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In the H. mine the workmen had power to dismiss themselves at a moment's notice. The respondents were workmen employed in the H. mine, and being dissatisfied with their working-place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the respondents however ascended contrary to his direction:—*Held*, that the respondents had been guilty of a breach of the special rule above-mentioned. HIGHAM *v.* WRIGHT - - - - 397

**COMMISSION** - - - - - 375
*See* SHIP. 2.

**COMPANY**—*Fraudulent Prospectus—Concealment of Contracts affecting the Company—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Words* "*Knowingly Issuing*"—*Measure of Damages.*] Action brought by the plaintiff under the Companies Act, 1867, s. 38, to recover the amount paid by him on certain shares taken by him in the L. Company on the ground of the fraud of the defendants (promoters of the company), in omitting from the prospectus two contracts entered into by them as promoters—the one a contract between the defendants C. & P. and one S., for the purchase of certain foreign concessions for the construction of tramways which the company was afterwards incorporated to make and work; the other a contract between the defendants, C. & P. and the defendant G., as to certain payments to be made by C. & P. to G. in consideration of his obtaining for them a contract from the company for the construction of the tramways, by means of which fraud the plaintiff had been induced to take the shares, which proved worthless. The jury found that these contracts were material to be made known to the intended shareholders of

**COMPANY**—*continued.*
the company:—*Held*, by the Common Pleas Division and in the Court of Appeal by Cockburn, C.J., and Brett, L.J., that the contracts ought to have been specified in the prospectus, and that the defendants were liable; Kelly, C.B., and Bramwell, L.J., dissenting:—*Held*, by the Common Pleas Division and in the Court of Appeal, by Cockburn, C.J., Bramwell and Brett, L.JJ., that the words "knowingly issuing" in s. 38 mean intentionally issuing a prospectus without inserting the contracts which are required by that section to be specified, although they are omitted under the bonâ fide belief that it is unnecessary to specify them.—At the trial the judge directed the jury that if the real damage occasioned to the plaintiff by the defendants' fraud was the price he paid for the shares he was entitled to recover that amount. The jury assessed the damages at the price paid by the plaintiff:—*Held*, by Cockburn, C.J., Bramwell and Brett, L.JJ., affirming the judgment of the Common Pleas Division that the direction was right, and that the shares taken by the plaintiff being worthless he was entitled to recover the amount paid by him for them; Kelly, C.B., dissenting. Twycross *v.* Grant - - - - - C. A. 469

**COMPENSATION**—For injuring land - 99
*See* Lands Clauses Act.

**COMPOSITION** - - 281, 314, 403
*See* Bankruptcy. 1, 2, 3.

**COMPULSORY**—Retirement of officers - 445
*See* Crown.

**CONCEALED DANGER** - - - 308
*See* Negligence. 3.

**CONDITIONS** - - - - - 416
*See* Railway Company.

—— of Sale - - - - 342
*See* Sale of Land. 2.

**CONSTRUCTION OF DEED**—*Lease and Counterpart, Discrepancy between — Clerical Error in Lease.*] By an indenture of lease dated in 1784 and executed by the lessor, he demised certain premises to hold to the lessee and his assigns for the term of ninety-*four* and a quarter years, yielding and paying therefor during the said term of ninety-*one* and a quarter years hereby demised a yearly rent. The number of years was not mentioned in any other clause of the lease. But the counterpart, executed by the lessee, which was otherwise identical with the lease, had ninety-one in the habendum as well as in the reddendum. In an action by the assignee of the reversion to recover possession against the assignee of the lessee after the lapse of the ninety-one and a quarter years:—*Held*, overruling the judgment of the Common Pleas Division (by Cockburn, C.J., and Bramwell and Amphlett, JJ. A.; Kelly, C.B., dissenting), that, there being a manifest clerical error in the lease, the counterpart might be looked at to ascertain where the mistake lay, and that, on the true construction of the lease and counterpart taken together, the "ninety-four" in the lease must be rejected, and the lease read as a grant for ninety-one and a quarter years only. Burchell *v.* Clark - - - - C. A. 88

**CONSTRUCTION OF STATUTE** - - 562
*See* Dilapidations.

**COPYRIGHT** — *Infringement — Material Part* — 3 & 4 *Wm.* 4, *c.* 15, *s.* 2.] In order to recover penalties under the Dramatic Copyright Act, for pirating a dramatic production, the plaintiff must shew that a material and substantial part has been pirated. Chatterton *v.* Cave C. A. 42

**COSTS**—Of confessing defence - - 592
*See* Practice. 5.

—— Of action for libel - - - 119
*See* Practice. 7.

—— Security for - - - - 430
*See* Practice. 8.

—— Taxation - - - - - 273
*See* Practice. 10.

—— Of abortive trial - - - 309
*See* Practice. 6.

**COVENANT**—Implied, for adjacent and subjacent support - - - - 572
*See* Sale of Land.

**CREDIT**—Of witness - - - - 53
*See* Defamation.

**CROPS, GROWING** - - - - 212
*See* Bill of Sale.

**CROWN** — *Prerogative of the — Compulsory Retirement of Military Officers—East India Company's Service — Libel—Publication in Gazette.*] In an action against the Secretary of State for India the claim stated that plaintiff accepted a commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the company's service, which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient—and that, before the removal of any officer from any appointment, he should be made acquainted in writing of the accusation preferred against him and should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that he was compelled to subscribe to a military fund to provide for widows and orphans of officers, and that if he had continued in the service his widow would have been entitled to an allowance out of a fund called "Lord Clive's Fund." That after the Indian forces had been transferred to the Crown he, while in the performance of military duty, and in all respects physically and mentally competent to perform any duties which were or might be required of him,—was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the Governor-General of India with the sanction of the defendant, by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, &c., might be required to retire upon a pension; and, upon his declining voluntarily to retire, he was compulsorily placed upon the pension-list; and the fact of his removal to the pension-list was notified in the usual way by a general order of the Commander-in-Chief published in the *Gazette*:—*Held*, on demurrer, that the claim disclosed no cause of action, for the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure, and the defendant could make no contract in derogation of such power, and the customs, regulations, &c., relied

**CROWN**—*continued.*
on by the plaintiff must be taken to be always subject to it, and incapable of superseding it, and further that the publication in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be responsible in an action for libel. GRANT *v.* THE SECRETARY OF STATE FOR INDIA - - - - 445

**DAMAGE, SPECIAL** - - - - 24
*See* DEFAMATION. 2.

—— - - - - - - 119
*See* PRACTICE. 4.

**DAMAGES**—Measure of - - - 469
*See* COMPANY.

**DEBT**—Description of, in debtor's statement 314
*See* BANKRUPTCY. 3.

**DEFAMATION**—*Privilege of Witness—Answer as to Credit of Witness.*] A witness in a court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.—A statement, as to another matter, made to justify the witness in consequence of a question going to the witness' credit, has reference to the inquiry within the above rule.—Defendant, an expert in handwriting, gave evidence in the trial of *D.* v. *M.* that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of a document, on a charge of forgery before a magistrate. In cross-examination he was asked whether he had given evidence in the suit of *D.* v. *M.*, and whether he had read the judge's remarks on his evidence. He answered, "Yes." Counsel asked no more questions, and defendant insisted on adding, though told by the magistrate not to make any further statement as to *D.* v. *M.*: "I believe that to be a rank forgery, and shall believe so to the day of my death."—An action of slander for these words having been brought by one of the attesting witnesses to the will:—*Held*, that the words were spoken by defendant as a witness, and had reference to the inquiry before the magistrate, as they tended to justify the defendant, whose credit as a witness has been impugned; and that the defendant was, therefore, absolutely privileged. SEAMAN *v.* NETHERCLIFT - - - - C. A. 53

2. —— *Libel, in the Nature of Slander of Title—Special Damage.*] The plaintiffs, vocalists, advertised in a theatrical newspaper, as follows: "The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co." (music publishers) "and others, for their kind unhesitating permission to sing any morceaux from their musical publications." The defendant, who was interested as agent for the proprietors of the "stage-right" of certain songs published by the firms mentioned, wrote to the proprietors of two music halls at which the plaintiffs were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties under the Copyright Act, inasmuch as the publishers named had in some instances no power



**DEFAMATION**—*continued.*
to give the alleged permission, and insinuating that music hall singing was not calculated to create a demand for their musical publications. Upon a motion to set aside a nonsuit:—*Held*, that inasmuch as the letters were reasonably susceptible of a construction which would make them libellous, the opinion of the jury ought to have been taken upon their meaning. HART *v.* WALL [146

3. —— *Privilege by Reason of the Occasion—Publication of Matters of Public Interest—Meetings of Poor-law Guardians—Ex parte Charges.*] The administration of the poor-laws, both by the government department and by the local authorities, including the conduct of the medical officers, is matter of public interest; but the publication of a report of proceedings at a meeting of poor-law guardians, at which ex parte charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. PURCELL *v.* SOWLER - C. A. 215

**DEFENCE** - - - - - 70
*See* PRACTICE. 9.

**DELEGATION**—Of powers - - - 253
*See* LOCAL GOVERNMENT ACTS.

**DEMURRAGE** - - - - 247
*See* SHIP. 4.

**DEPOSIT**—Recovery of - - - 342
*See* SALE OF LAND. 2.

**DILAPIDATIONS**—*Ecclesiastical Dilapidations Act*, 1871 (34 & 35 *Vict. c.* 43), *s.* 29—*Construction of Statute—Directory or Imperative—Ecclesiastical Dilapidations—Direction of Bishop to Surveyor to inspect and report more than Three Months after Avoidance of Benefice.*] By the Ecclesiastical Dilapidations Act, 1871, s. 29, "within three calendar months after the avoidance of any benefice . . . . the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable":—*Held*, that the provision as to the time within which the bishop is to direct the surveyor to inspect and report upon the buildings of a benefice after its avoidance is directory only, and not imperative; and that a direction to inspect and report made by a bishop more than three months after the avoidance of a benefice may be valid. CALDOW *v.* PIXELL - - - - - 562

**DIRECTORY OR IMPERATIVE** - - 562
*See* DILAPIDATIONS.

**DISCHARGE FEE** - - - - 300
*See* SHERIFF.

**DISORDERLY PERSON** - - - 125
*See* NEGLIGENCE. 2.

**DISTRESS, POWER OF** - - - 38
*See* PARLIAMENT. 2.

**DRUNKENNESS, PERMITTING** - - 74
*See* PUBLIC HOUSE.

**EJECTMENT**—From rectory house and glebe 179
*See* EXCHANGE OF LIVINGS.

**EMPLOYED**—In or about works - - 397
*See* COAL MINES REGULATION ACT.

**EMPLOYMENT**—Scope of - - - 205
*See* Master and Servant. 2.
**EVIDENCE** - - - - - 369
*See* Negligence. 1.
—— - - - - - - 125
*See* Railway Company.
—— Promise of marriage - - - 265
*See* Marriage, Breach of Promise of.

**EXCHANGE OF LIVINGS**—*Effect of Deed of Resignation where the Exchange falls through—Ejectment for the Rectory House and Glebe.*] In 1864 the plaintiff was presented, instituted, and inducted to the rectory and living of L. In 1867 he obtained permission to exchange livings with some clergyman to be approved by the patron, and thereupon entered into negotiations with one P., the incumbent of the living of C. The patron, having satisfied himself of the suitability of P., approved of the proposed exchange of livings, and promised to do all things necessary on his part to carry it out. Relying on this promise, and having obtained the sanction of the bishop to the exchange, the plaintiff executed a deed of resignation of the living of L., and delivered it to the bishop's registrar, who received it with knowledge that it was executed with a view only to exchange. The patron failing to present P. to the living of L., but claiming an absolute right to dispose of it by reason of the plaintiff's resignation, in violation of his promise presented the defendant thereto, and the defendant, with knowledge of all the premises, accepted the presentation, and "took possession of the rectory house, glebe lands, and *living* of L.," and still remained in possession thereof. In ejectment by the plaintiff to recover possession of "the rectory house and glebe lands:"—*Held*, by Denman, J., on demurrer to the claim, that the mere fact of the exchange having failed would not entitle the plaintiff to maintain ejectment against the new incumbent, who was in possession of the living (as must be assumed from the statement of claim) by institution and induction; the plaintiff's remedy, if any, being against the patron for the breach of his agreement. Rumsey *v.* Nicholl - - - - - 179

**EXPOSING**—Infected person - - 187
*See* Public Health Act.

**FACTOR**—*Or Agent intrusted otherwise than for Sale or Dealing—Factors Acts*, 6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39.] The plaintiff, a tobacco-manufacturer at Bolton, bought of H., a commission-merchant and agent, and also a dealer in tobacco, 50 hhds. of tobacco then lying in bond in the name of H. in the L. Dock. The price was paid, but the tobacco was to remain in the dock, to be forwarded to the plaintiff as he might want it for the purpose of his business, with an understanding that the tobacco was to be cleared by H. and dispatched to Bolton free of any charge for commission, or, should the plaintiff sell any portion of it, to be delivered to his vendees; the plaintiff remitting to H. the amount of duty and dock charges. This arrangement was one so usual in the tobacco trade that any other arrangement was exceptional. For this purpose the tobacco was allowed to remain in the

**FACTOR**—*continued.*

name of H. in the dock books, and he retained the dock-warrants. In his own books, however, the transaction was entered as a sale to the plaintiff.—H., representing the tobacco to be his own property, pledged it with the defendants as security for a loan, handing them the dock-warrants; and he caused the tobacco to be transferred into their names in the dock books, the defendants having no knowledge that the plaintiff was interested in it. H. shortly afterwards absconded, and was adjudicated bankrupt. The plaintiff demanded the tobacco of the defendants, but they claimed to retain it, either on the ground that the plaintiff had armed H. with an ostensible authority to deal with the goods as his own, or that he was intrusted with the tobacco or the documents of title with authority to pledge or sell, within the Factors Acts:—*Held*, by Denman, J., on motion for judgment, the judge having power to draw inferences of fact, that H. was not intrusted with the tobacco as factor or agent for sale, but only to clear and forward it to the plaintiff or to his vendees as and when required, and consequently that he had no authority to sell or to pledge it.—*Held*, also, that, looking at the usage of the trade, the plaintiff had not given any ostensible authority to H. to pledge the tobacco. Johnson *v.* The Credit Lyonnais [224

**FALSE IMPRISONMENT**—*Action for—Right to Notice of Action under ss.* 103, 113, *of* 24 *&* 25 *Vict. c.* 96—"*Found committing*"—"*Immediately apprehended.*"] In an action for false imprisonment, defendant set up as a defence that he had had no notice of action, to which he was entitled under s. 113 of 24 & 25 Vict. c. 96; for that he had caused plaintiff to be arrested under s. 103, believing he had found her committing a felony. The jury found that plaintiff had not committed the felony, but that defendant bonâ fide believed, and on reasonable grounds, in the existence of facts which would have justified him in acting as he had done. On this finding the verdict was entered for defendant. Plaintiff had not been apprehended on the spot where defendant believed he had found her committing the felony, and the question, whether or not she had been "immediately apprehended," had not been left to the jury:—*Held*, that this was a question of fact for the jury, which ought to have been left to them, and that there must therefore be a new trial. Griffith *v.* Taylor. Thatcher *v.* Taylor [C. A. 194

**FIERI FACIAS** - - - - 300
*See* Sheriff.
**FOUND COMMITTING** - - - 194
*See* False Imprisonment.
**FRAUD** - - - - - 1
*See* Bankruptcy. 5.
**FRAUDULENT PROSPECTUS** - - 469
*See* Company.
**GENERAL AVERAGE** - - - 578
*See* Ship. 6.
**GUARDIANS**—Meetings of poor law - 215
*See* Defamation. 3.

**HIGHWAY**—*Incroachment on*—27 & 28 *Vict. c.* 101, *s.* 51—*Limitation of Time for Information*—11 & 12 *Vict. c.* 43, *s.* 11.] Under 27 & 28 Vict. c. 101, s. 51,—which enacts that if any person shall incroach by making or causing to be made any building or fence on the side of any carriage way within fifteen feet from the centre thereof, he shall be subject to a penalty not exceeding 40*s.*,—the incroachment is not a continuing office, and the six months' limitation created by 11 & 12 Vict. c. 43, s. 11, commences from the completion of such building or fence. Coggins *v.* Bennett [568

**"IMMEDIATELY APPREHENDED"** - 194
*See* False Imprisonment.

**INDIA, EAST, COMPANY** - - - 445
*See* Crown.

**INDORSEMENT**—By agent - - - 151
*See* Cheque.

**INFRINGEMENT** - - - - 42
*See* Copyright.

**INJUNCTION**—To restrain act calculated to endanger - - - - 572
*See* Sale of Land.

**INLAND REVENUE ACTS**—32 & 33 *Vict. c.* 14, *s.* 27; 38 & 39 *Vict. c.* 23, *s.* 11—*Keeping Carriage without Licence—Letting for less than a Year.*] By s. 27 of 32 & 33 Vict. c. 14, a penalty of 20*l.* is imposed upon a person keeping a carriage without a licence: and by s. 11 of 38 & 39 Vict. c. 23, "every person who shall let any carriage for hire for any period less than one year shall for the purpose of the 32 & 33 Vict. c. 14, be deemed to be the person keeping such carriage."—The respondent, a coach-builder, by an agreement in writing let to one R. two clarence cabs on hire at 30*s.* per week, payable weekly, the cabs to be the property of R. if he regularly paid the 30*s.* for seventy-five weeks consecutively, and an additional 5*l.* at the expiration of that period; but it was stipulated that, if R. should omit to make any of the weekly payments as agreed, the respondent might resume possession of the cabs:—*Held*, that under the agreement there was no letting of the cabs for a period less than one year, so as to make the respondent the "person keeping" them within the meaning of the Act. Barber *v.* Callow - 558

**INVITATION** - - - - - 308
*See* Negligence. 2.

**LAND DRAINAGE ACT** - - - 255
*See* Local Government Acts.

**LANDLORD**—Liability of - - - 311
*See* Landlord and Tenant.

**LANDLORD AND TENANT**—*Liability of Landlord for Injury happening to Stranger during Tenancy — Liability of Landlord for defective Repair of demised House—Negligence.*] A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition: in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy.—The defendants let to F. a

**LANDLORD AND TENANT**—*continued.*
house by an agreement in writing, by which F. agreed "to do all necessary repairs to the said premises except main walls, roof, and main timbers." There was no agreement by the defendants to repair, and the house was in good condition at the time of letting it. Owing to the defendants' negligence in not repairing a part of the main walls, a chimney-pot during the tenancy of F. fell upon the plaintiff, who was a servant of F., and injured him:—*Held*, that the plaintiff was not entitled to recover compensation from the defendants for the injury sustained to him. Nelson *v.* The Liverpool Brewery Company - 311

**LANDS CLAUSES ACT, 1845** (8 & 9 *Vict. c.* 18), *ss.* 9, 22, 68—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12—*Purchase of Stream of Water — Compensation for injuriously affecting Land — Tenant for Life—Ultra vires.*] Under a local Waterworks Act, which incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, the defendants were empowered to take, use, divert, and appropriate certain streams, and amongst others a stream necessary for the working of a mill, of which the plaintiff was tenant for life. The defendants gave the plaintiff notice of their intention to take the whole of the stream, but actually diverted only a portion of it; and afterwards, by an agreement purporting to be made under the special Act, the plaintiff and defendants nominated two practical surveyors to determine the amount of compensation to be then paid by the defendants for the damage which the owner or owners for the time being of the mill might sustain by the abstraction of the whole of the stream which the defendants were authorized to take. The two surveyors did not agree on a valuation, and accordingly a third surveyor was nominated by two justices under the 9th section of the Lands Clauses Act, on the application of the defendants, and with the consent of the plaintiff, to determine the amount of compensation for the damage to the mill, and he awarded the sum of 939*l.* for compensation for the permanent damage to the owners of the mill from the abstraction of the whole of the stream.—To a statement of claim alleging the above facts, the defendants demurred, on the ground that they had no power to agree to make compensation for the abstraction of the whole stream, but only for such damage as was done to the owner of the mill from time to time:—*Held*, affirming the decision of the Common Pleas Division, that the defendants had power under their Act to purchase and divert the whole stream, and that having given notice to the plaintiff of their intention to do so, they were bound and empowered to make compensation at once for the whole value of the interest of the owners of the mill in the stream, and not merely to compensate them from time to time for injuriously affecting the property.—*Held*, also, that if the case was considered as one of injuriously affecting the property, the statement disclosed a good agreement, by a limited owner for compensation for permanent injury to the property, under the 9th and 68th sections of the Lands Clauses Act, 1845.—The 9th section of the Lands Clauses Act, 1845, applies to compensation for injuriously

**LANDS CLAUSES ACT, 1845**—*continued.*
affecting land not taken by the promoters as well as to compensation for taking lands: the words "injury to any *such* lands" meaning injury to lands held by persons under disability.—The 68th section of the same Act applies to persons under disability claiming compensation for permanent injury to land as well as to owners in fee.—*Ferrand* v. *Corporation of Bradford* (21 Beav. 412), followed.—*Bush* v. *Trowbridge Waterworks Co.* (Law Rep. 19 Eq. 291; 10 Ch. 459), distinguished. Stone *v.* The Mayor, &c., of Yeovil [C. A. 99

—— Notice to treat - - - - 9
*See* Practice.

**LEAKAGE OR BREAKAGE** - - - 432
*See* Ship. 2.

**LEASE AND COUNTERPART**—Discrepancy between - - - - 88
*See* Construction of Deed.

**LETTING FOR LESS THAN A YEAR** - 558
*See* Inland Revenue Act.

**LEVY FEE** - - - - - 300
*See* Sheriff.

**LICENSED PERSON**—Drunk on his own premises
*See* Public House. [74

**LICENSEE** - - - - - 308
*See* Negligence. 3.

**LIEN** - - - - - - 247
*See* Ship. 4.

**LIMITATION**—Of time for information - 568
*See* Highway.

**LOCAL GOVERNMENT ACTS** — *Delegation of Powers to a Committee*—*Land Drainage Act*, 1861 (24 & 25 *Vict. c.* 133), *sched. Part II., clause* 6.] Where a board constituted by an Act of Parliament are authorized by it to delegate any of their powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert; and it is not competent to the committee to apportion amongst themselves the duties so delegated to them; and one of them acting alone, pursuant to such apportionment, cannot justify his acts under the Act of Parliament. Cook *v.* Ward - - C. A. 255

**MALICIOUS INJURY TO PROPERTY**—24 & 25 *Vict. c.* 97, *s.* 41—*Placing Poisoned Flesh in Inclosed Land*—27 & 28 *Vict. c.* 115, *s.* 2.] The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under 24 & 25 Vict. c. 97, s. 41.—But, *semble*, that it is within 27 & 28 Vict. c. 115, s. 2. Daniel *v.* Janes - - - - 351

**MARRIAGE**—*Breach of Promise of*—*Material Evidence in support of Promise*—32 & 33 *Vict. c.* 68. *s.* 2.] In an action for breach of promise of marriage, the plaintiff having sworn that the defendant had seduced her and had repeatedly promised to marry her, her sister gave evidence that, at an interview she had with the defendant when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought upon the plaintiff, when he said "he would marry her and give her anything, but I must not expose him." The sister further stated that, after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant, in the course of which the plaintiff said to the defendant, "You always promised to marry me, and you don't keep your word," when the defendant said he would give her some money to go away:—*Held*, reversing the judgment of the Common Pleas Division, that this was "material evidence in support of the promise" to satisfy the requirement of 32 & 33 Vict. c. 68, s. 2. Bessela *v.* Stern - - C. A. 265

**MASTER AND SERVANT**—*A. not liable for the Negligence of his Servant while employed under the Control of B.*] The defendants having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labour, the defendants to provide and place at the disposal of W. the necessary engine power, ropes, and hoppets, with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer:—*Held*, affirming the judgment of the Common Pleas Division, that though the engineer remained the general servant of defendants, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of defendants, who were therefore not liable for his negligence. Rourke *v.* The White Moss Colliery Company C. A. 205

2. —— *Negligence—Scope of Employment.*] The defendant's carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out the defendant's horse and cart, and on his way home negligently ran against the plaintiff's cab and damaged it. The course of the employment of the carman was, that with the defendant's horse and cart he took out beer to customers of the defendant (a brewer), and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from the defendant a gratuity of 1*d.* each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public-house which his master supplied, and for which he afterwards received the customary 1*d.*:—*Held*, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. Rayner *v.* Mitchell - - 307

**MATERIAL PART** - - - - 42
*See* Copyright.

**METALLIFEROUS MINES REGULATION ACT, 1872** (35 & 36 *Vict. c.* 77), *ss.* 13, 41—*Liability to fence abandoned Shafts*—"*Persons interested in the Minerals.*"] Sect. 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), enacts that, where a mine to which the Act applies is abandoned, or the working thereof is discontinued, the owner thereof and every other person interested in the minerals of the mine

**METALLIFEROUS MINES REGULATION ACT, 1872**—*continued.*

shall cause the top of the shaft to be securely fenced for the prevention of accidents,—provided that, subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section; and by the interpretation clause (s. 41) "owner" means any person who is the immediate proprietor, or lessee, or occupier of any mine, and does not include a person who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine.—The respondents, who were owners in fee of mines and minerals, demised a lead mine, part of the estate, for a term of years, subject to a rent or royalties, such royalties to be paid upon the place where the ore should have been gotten or weighed and before it should be taken away; the lease also reserving to the respondents powers of distress and re-entry if the royalties should be in arrear. The lessees ceased working the mine and left and allowed it to remain insufficiently fenced:—*Held*, that, although the lease was still in force and undetermined, the respondents were guilty of an offence under s. 13 as "persons interested in the minerals of the mine." EVANS *v.* LADY MOSTYN - 547

**METROPOLIS MANAGEMENT ACT** - 391
*See* SCAVENGER.

**MORTGAGEE**—Of Ship - - - 163
*See* SHIP. 1.

**MUNICIPAL ELECTION** — *Nomination Paper — Burgess Roll—Situation of Property of Seconder — Alteration of Name of Street — Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *sub-ss.* 2, 3, *and sch.* 1, *from* 2—"*Situation of the Property in respect of which he is enrolled on the Burgess Roll.*"] S. was nominated a candidate for the office of councillor in the borough of B.; in his nomination paper his seconder was described as of H. Street. The situation of the property of the seconder was described on the burgess roll as being in W. Street. The street was generally known as H. Street, and its name had been only recently changed to W. Street; no one had been or could be misled by the description thereof as H. Street. The mayor of B. having declared the nomination paper to be void on the ground that the seconder of S. had improperly described the situation of the property, in respect of which he was enrolled on the burgess roll:—*Held*, that the situation of the property of the seconder was sufficiently described, and that the decision of the mayor was wrong. SOPER *v.* MAYOR OF BASINGSTOKE - - 440

**NEGLIGENCE** — *Sub-Contractor — Evidence — Question for Jury.*] The defendants were builders and contractors who, after the outside of a house was finished, had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff, who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public.—*Held*, that the defendants were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of the defendants to provide against it.—By Lord Coleridge, C.J., and Bramwell, L.J. (Brett, L.J., doubting), that if it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor and not of the defendants.—*Bridges* v. *North London Ry. Co.* (Law Rep. 7 H. L. 213) discussed. PEARSON *v.* COX - - - - - C. A. 369

2. —— *Evidence — Accident — Railway—Disorderly Persons—Order.*] The plaintiff was a passenger by the defendants' railway, and at one station, though all the seats in the carriage in which the plaintiff was were filled, three more persons got in and stood up. There was no evidence that the defendants' servants were aware of this, but the plaintiff remonstrated with the persons who had so got in. At the next station, the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train:—*Held*, by Cockburn, C.J., and Amphlett, J.A. (Kelly, C.B., and Bramwell, J.A., dissenting), affirming the decision of the Court of Common Pleas, that there was evidence from which the jury might infer negligence on the part of the defendants so as to entitle the plaintiff to recover damages. JACKSON *v.* THE METROPOLITAN RAILWAY COMPANY - - C. A. 125

3. —— *Licensee—Invitation—Concealed Danger.*] A barge of the defendant being unlawfully navigated on the river T., the plaintiff, a waterman, complained to the man in charge, who referred him to R., the defendant's foreman; the plaintiff went to the defendant's wharf in order to speak to R., and whilst he was there a bale of goods, by the negligence of the defendant's servants, fell upon him and injured him; the plaintiff had had no warning that the bale might fall:—*Held*, that the plaintiff was entitled to maintain an action for the injury sustained by him.—*Corby* v. *Hill* (4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318) and *Indermaur* v. *Dames* (Law Rep. 1 C. P. 274; and on appeal, Law Rep. 2 C. P. 311) followed. WHITE *v.* FRANCE - 308

—— - - - - - - - 311
*See* LANDLORD AND TENANT.

—— - - - - - - - 205
*See* MASTER AND SERVANT. 1.

—— - - - - - - - 125
*See* RAILWAY COMPANY.

**NOMINATION PAPER** - - - 440
*See* MUNICIPAL ELECTION.

**NOTICE OF ACTION, RIGHT TO** - - 194
*See* False Imprisonment.

**NOTICE OF MOTION** - - - 21
*See* Practice. 1.

**ORDER**—On Banker - - - - 151
*See* Cheque.

**PARLIAMENT**—*Borough Vote—Alms which by the Law of Parliament disqualify from voting—2 Wm. 4, c. 45, s. 36.*] The word "alms" in s. 36 of the Reform Act, 2 Wm. 4, c. 45, is not confined to parochial donations or sums distributed by the overseers other than from the funds collected for the poor-rates, but may include moneys distributed annually from the income of a private charitable trust bequeathed by an individual for the use of the poor inhabitants of a parish.—What "receipt of alms" will constitute such a state of absolute indigence and dependence as to work a disqualification "by the law of Parliament" to be registered as a voter, must depend upon the circumstances of each particular case.—Lands were devised to trustees and their heirs, upon trusts to apply the rents, &c., for the putting forth and placing abroad of poor children of the tything of W., the surplus to be distributed unto "*the poorest inhabitants of the said tything*, as my said trustees and their assigns shall think fit." The surplus usually amounted to 40*l.*, which was distributed once a year amongst about eighty of the labouring population of W., according to the discretion of the trustees, and without solicitation, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family.—C. and P., who in other respects were entitled to be registered, had within the electoral year each received a donation of 12*s.* 6*d.* from this charity. Neither had received parochial relief within the year. Both were agricultural labourers with large families, and both were found by the revising barrister to be "proper recipients of the charity:"—*Held*, that this was a receipt of "alms" which by the law of Parliament disqualified the parties from being registered as voters. Harrison *v.* Carter - - 26

2. —— *County Vote—Rent-charge on Reversion—Power of Distress.*] By indenture of September, 1874, the reversion in fee in certain lands was conveyed to C., subject to certain terms of 1000 years created by indenture of demise of July, 1864, which reserved a ground-rent and a power of re-entry in default. C. by indenture of January, 1875, granted to D. and to four other persons a rent-charge of 2*l.* 10*s.* each charged upon the lands, with a power of distress in default of payment, and the grantees were in the actual receipt of the same. The value of the reversion was sufficient to bear the charges:—*Held*, that the grantees of the rent-charges had "free land or tenement to the value of 40*s.* by the year" within 8 Hen. 6, c. 7, although the power of distress was nugatory. Dawson *v.* Robins 38

**PAYMENT** - - - - - 151
*See* Cheque.

**PAYMENTS, SEPARATE** - - - 46
*See* Principal and Surety.

**POISONED FLESH** - - - - 351
*See* Malicious Injury to Property.

**POUNDAGE** - - - - - - 300
*See* Sheriff.

**PRACTICE**—*Adding Defendant—Order XVI., Rule 13—"Questions involved in the Action"—Order II., Rule 6—Bills of Exchange Act.*] In an action on a bill of exchange against the acceptor, the defendant sought to add the name of a company as defendants under Order XVI., Rule 13, upon the following grounds:—It was alleged by the defendant that the acceptance was given for the purchase-money of a ship which he had agreed to purchase of the plaintiffs; that in entering into the agreement for such purchase he had acted as a trustee for the company, to whom the ship was afterwards conveyed in pursuance of the agreement, and that the plaintiffs made fraudulent representations with regard to the ship, by reason of which the company had been put to useless expense, which they claimed to recover from the plaintiffs.—The Court refused the application.—Per Lord Coleridge, C.J., and Grove, J., the case was not one to which the 13th Rule of Order XVI. applied. Effect of Order II., Rule 6, which continues the procedure under the Bills of Exchange Act, considered. Norris *v.* Beazley - - - - - 80

2. —— *Appeal from Order of Judge at Chambers—Time for Appealing—Judicature Act*, 1875, *Order LIV., Rule* 6.] A judge at chambers having made an order on the 20th of August, the party affected by such order moved the Divisional Court to rescind it during the Michaelmas sittings within eight days from the commencement of such sittings:—*Held*, that the application was too late, inasmuch as by the 6th Rule of Order LIV. an appeal from a judge at chambers must be within eight days from the decision appealed against. Crom *v.* Samuels - 21

3. —— *Notice of Motion—Time—Judicature Act*, 1875—*Order LIII., Rule* 4—*Order LIV., Rule* 6.] Where notice of motion of appeal from a decision in chambers was given on the eighth day after the decision:—*Held*, that under Order LIV., Rule 6, it was too late, as the notice must be given so that the motion can be heard within eight days after the decision appealed against. Fox *v.* Wallis - - - - C. A. 45

4. —— *Attachment under Order XLV., Rule* 2—*Debt "owing or accruing"—Notice to treat, under Lands Clauses Consolidation Act*, 1845, 8 & 9 *Vict. c.* 18.] A mere notice to treat, upon which nothing has been done, does not constitute "a debt owing or accruing," which can be attached under Order XLV., Rule 2, of the Judicature Act, 1875. Richardson *v.* Elmit - 9

5. —— *Costs on Confessing a Defence under Order XX., Rule* 3—*Costs under Order LV.*] In an action for rent, and for damages for breach of covenant in not building a wall, and also claiming an injunction, the defendant paid money into court to satisfy the claim for rent, and pleaded performance of the covenant by building the wall after the commencement of the action, and paid into court 1*l.* in respect of the breach before action. The plaintiff took the money out of court, confessed "the defence" as to the wall, and claimed costs under Order XX., Rule 3:—*Held*, that he was not entitled to such costs, for the statement did not amount to a "defence,"

**PRACTICE**—*continued.*

within the meaning of that rule; but that he was entitled to the costs of the action under Order LV., or under the County Court Act, 15 & 16 Vict. c. 54, s. 1. CALLANDER *v.* HAWKINS - 592

6. —— *Order LV.—Costs of Abortive Trial—New Trial—Costs to "follow event."*] Where on the trial of an action a nonsuit is directed which is set aside and a new trial granted, and on the second trial the plaintiff has a verdict and judgment, the plaintiff is entitled to the costs of the first trial and of the rule for a new trial as part of the costs which "follow the event," under the latter part of Order LV. CREEN *v.* WRIGHT [C. A. 369

7. —— *Costs—Libel—"Follow the Event"—Judicature Act*, 1875, *Order LV.*] The effect of the Judicature Act, 1875, Order LV., is to repeal the previous statutes as to costs, with the exception of such of the provisions of the County Courts Act, 1867, as are expressly preserved by s. 67 of the Judicature Act, 1873.—The plaintiff in an action of libel recovered one farthing damages. The judge at the trial refused to give any certificate with regard to costs:—*Held*, that by Order LV. the plaintiff was entitled to costs. PARSONS *v.* TINLING - - - - 119

8. —— *Security for Costs—Rules of Court*, 1875,—*Order LVIII., Rule* 15—"*Special circumstances.*"] The fact that an appellant is a foreigner domiciled abroad with no assets in this country, is a "special circumstance" within Order LVIII., Rule 15, and entitles the respondent to security for costs of appeal from an interlocutory order. GRANT *v.* THE BANQUE FRANCO-EGYPTIENNE - - - - C. A. 430

9. —— *Order XIV., Rule* 1—*Signing Judgment—No Defence—Affidavit by Plaintiff.*] An application under Order XIV., Rule 1, that the defendant may be called upon to shew cause why final judgment should not be signed, must be made on an affidavit that in the plaintiff's belief there is no defence to the action.—Per Grove and Denman, JJ. The affidavit must be made by the plaintiff himself; and per Cockburn, C.J. *Quære*, whether any one else can make such an affidavit. FREDERICI *v.* VANDERZEE - - C. A. 70

10. —— *Costs—Taxation between Party and Party—Procuring Evidence—Expenses of Surveying and Reporting upon Property forming Subject-Matter of Action—Witnesses qualifying themselves for Examination.*] No. 8 of the Special Allowances and General Provisions annexed to the Rules of the Supreme Court (Costs), which directs that "reasonable charges and expenses . . . . in procuring evidence . . . . are to be allowed," extends to the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice.—An action for the recovery of houses by reason of a breach of covenant to repair them was referred to a special referee. Three surveyors were instructed by the plaintiff to survey the houses, and report upon their condition. At the hearing before the special referee the surveyors were called as witnesses, and the surveys and reports made by them were necessary for the proper conduct of the plaintiff's case. The plaintiff obtained judgment in the action with costs. Upon taxation of costs

**PRACTICE**—*continued.*

the master refused to allow as against the defendant the fees paid to the surveyors by the plaintiff for their surveys and reports, upon the ground that these fees could under no circumstances be recovered as between party and party:—*Held*, that the decision of the master was wrong, and that the fees paid to the surveyors were proper to be taxed; for under No. 8 of the Special Allowances and General Provisions above-mentioned, the expenses of witnesses qualifying themselves for examination might be allowed. MACKLEY *v.* CHILLINGWORTH - - - - - - 273

11. —— *Service of Writ upon a Foreigner residing Abroad—Local Limits of the Court's Jurisdiction—Order XI., Rule* 1.] Sect. 527 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to *property*, and does not extend to injury to the *person*.—The ordinary Courts of this country have no jurisdiction over acts done by foreigners on the high seas below low-water mark: consequently, Order XI., Rule 1, of the Rules of 1875, does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within three miles of the English coast.—*Reg.* v. *Keyn* (2 Ex. D. 63) held binding to that effect on all the Courts. HARRIS *v.* OWNERS OF FRANCONIA - - 173

12. —— *Service of Writ out of the Jurisdiction—Slander of Title—Judicature Act*, 1875, *Order XI.*] A statement in the nature of slander of title, made out of the jurisdiction concerning property within the jurisdiction, is not an act or thing affecting such property within the meaning of Order XI., and consequently service of a writ in an action for such statement cannot be allowed out of the jurisdiction. CASEY *v.* ARNOTT - 24

**PRESCRIPTION** (2 *&* 3 *Wm.* 4, *c.* 71), *s.* 3—*Obstruction of Lights—Conveyance of adjoining Premises without Reservation of Easement.*] Upon a general conveyance of land, there is no implied grant, by the purchaser, of the easement of light necessary for the enjoyment of an adjacent house of the vendor.—In 1867, the plaintiff bought houses in Manchester the backs of which abutted on a street or way on the opposite side of which were certain cottages. In 1868 he purchased these cottages, but by a different title. Both sets of premises had existed in their then state for more than twenty years. In 1870, the plaintiff sold the cottages to one D., and ultimately D.'s interest therein became vested in the defendants, who pulled down the cottages and erected a large building upon the site of them and also upon a portion of the intervening street or way, and so obstructed the light to the plaintiff's windows. The conveyance to D. contained no reservation of any easement to the plaintiff's houses; and it professed to convey the land up to the back wall of the plaintiff's premises:—*Held*, that, notwithstanding the plaintiff's houses had acquired an "absolute and indefeasible" right to light at the time of the conveyance of the cottages to D., inasmuch as that conveyance was without reservation the defendants were guilty of no wrongful

**PRESCRIPTION**—*continued.*
obstruction of the plaintiff's lights. Ellis *v.* The Manchester Carriage Company - 13

**PRINCIPAL AND SURETY**—*Giving Time—Separate Payments.*] A principal (with sureties for the performance of the contract) contracted to take tar from a gas company, and to pay for each month's supply within the first fourteen days of the ensuing month, unless the company should by writing allow a longer time for payment. After the expiration of the first fourteen days of August the company took a promissory note from the principal for the amount due for July. Default was made by the principal in payment of the amounts due for July, for August, and for September:—*Held*, affirming the judgment of the Common Pleas Division, that, time having been thus given for the payment of the amouut due for July, the sureties were discharged as to that amount; but, reversing the judgment of the Common Pleas Division, not as to the amounts due for August and for September; the contract being separable, and the position of the sureties as to those amounts not being affected by the giving time for payment of the amount due for July. The Croydon Commercial Gas Company *v.* Dickinson - - - - C. A. 46

**PRIVILEGE**—Of witness - - - 53
*See* Defamation.

**PROFITS** - - - - - 375
*See* Marine Insurance.

**PROPERTY**—Recovered or preserved - 362
*See* Solicitor.

**PUBLIC HEALTH ACT, 1875** (38 & 39 *Vict. c.* 55) —*Wilfully exposing an infected Person in a Public Street or Place.*] Sect. 126, sub-s. 2, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), subjects to a penalty any person who while suffering from an infectious disorder wilfully exposes himself, without proper precautions against spreading the disorder, in any street or public place, &c., or who, being in charge of any person so suffering, so exposes such person.—A medical man in practice in Tunbridge sent a patient who was suffering from scarlet fever to the fever hospital there with a certificate, directing him to walk in the middle of the road, and not to talk to any one, but, in consequence of an alleged informality in the certificate, the patient was refused admission; whereupon the medical man walked with him through the streets of the town to the residence of the chairman of the local board, from whom after some delay he obtained an order for the man's admission to the hospital. He then returned with the patient to the police-station to procure the ambulance to convey him thither.—Upon an information against the medical man for an alleged infringement of the statute, the justices were of opinion that it was not proved before them that the medical man "had charge of" the patient, that he had not wilfully exposed the patient in any street or public place "without proper precaution," and that he had made the best use of the means at his disposal to prevent the spread of the fever; and they refused to convict him:—*Held*, that their decision was right. The Tunbridge Wells Local Board *v.* Bisshopp - 187

**PUBLIC HOUSE**—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 13—"*Permits Drunkenness*"—*Licensed Person drunk on his own Premises.*] A licensed person cannot be convicted of permitting drunkenness under the 13th section of the Licensing Act, 1872, by reason of getting drunk on his own premises. Warden *v.* Tye - - 74

**PUBLICATION**—Matter of public interest - 215
*See* Defamation.

**PUBLICATION IN GAZETTE** - - 445
*See* Crown.

**RAILWAY COMPANY** — *Bailment — Deposit of Property in Cloak-room—Ticket — Condition indorsed thereon—Knowledge of the Condition by Depositor.*] On the deposit of articles at the cloak-room at a railway station, a charge is made of 2*d.* for each, and the depositor receives a ticket, on the face of which are printed the times of opening and closing the cloak-room and the words "See back," and on the back there is a notice that the company will not be responsible for any package exceeding 10*l.* A placard upon which is printed in legible characters the same condition is also hung up in the cloak-room.—The plaintiff deposited his bag, of value exceeding 10*l.*, in the defendants' cloak-room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value the plaintiff swore that he took the ticket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article, that he did not read the condition at the back of the ticket, nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? The jury answered both the questions in the negative, and judgment was directed for the plaintiff:—*Held*, by Mellish and Baggallay, L.JJ., that there ought to be a new trial, on the ground that there had been a misdirection by the judge, inasmuch as the plaintiff could be under no obligation to read the condition; and that the second question left to the jury ought to have been, whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition:—*Held*, further by Bramwell, L.J., that, on the above facts, it was a question of law, and that judgment ought to be entered for the defendants Parker *v.* The South Eastern Railway Company. Gabell *v.* The South Eastern Railway Company - - - - C. A. 416

**RENT-CHARGE**—On reversion - - 416
*See* Parliament.

**RESIGNATION DEED** - - - 179
*See* Exchange of Livings.

**RESOLUTIONS**—Validity of - - 1
*See* Bankruptcy. 4.

**RULES OF SUPREME COURT, Order II., r. 6** 80
*See* Practice.

—— **Order XI.** - - - - 24
*See* Practice. 12.

**RULES OF SUPREME COURT**—*continued.*
—— **Order XI., r. 1** - - - **173**
*See* PRACTICE. 11.
—— **Order XIV., r. 1** - - - **70**
*See* PRACTICE. 9.
—— **Order XVI., r. 13** - - - **80**
*See* PRACTICE.
—— **Order XX., r. 3** - - - **592**
*See* PRACTICE. 5.
—— **Order XLV., r. 2** - - - **9**
*See* PRACTICE. 4.
—— **Order LIV., r. 6** - - - - **21**
*See* PRACTICE. 1.
—— **Order LIV., r. 6** - - - - **45**
*See* PRACTICE. 2.
—— **Order LV.** - - - **119, 369**
*See* PRACTICE. 6, 7.
—— **Order LVIII., r. 15** - - - **430**
*See* PRACTICE. 8.
**RULES, SPECIAL** - - - - **397**
*See* COAL MINES REGULATIONS ACT.
**RUST, NOT ACCOUNTABLE FOR** - - **432**
*See* SHIP. 3.

**SALE**—Of birds imported from abroad - **553**
*See* BIRDS PROTECTION ACT.

**SALE OF LAND**—*Implied Covenant for Adjacent and Subjacent Support — Injunction to restrain Acts calculated to endanger.*] The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant.—A. sold land to B. for the purpose of an iron-foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability:—*Held*, ground for an injunction against A. and C., although no actual damage had been sustained by B. SIDDONS *v.* SHORT, HARLEY, & CO. - **572**

2. —— *Conditions of Sale—Time, Essence of Contract—Sale of Contingent Reversionary Interest in Railway Stock—Return of Deposit.*] The defendants, on the 6th of July, 1876, sold to the plaintiff by auction a reversion in railway stock, expectant on the decease of a married lady without issue who should attain the age of twenty-one years. The lady was then in her forty-fourth year, and had never had any children. The sale was subject to conditions, whereby it was provided that the purchaser should pay a deposit and the purchase be completed on or before the 17th of August then next; "but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchaser is (but without prejudice nevertheless to the vendor's rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of the purchase." By the seventh condition, should the purchaser neglect or fail to comply with any condition, "the deposit-money shall be forfeited and the vendor . . . . shall be at full liberty to resell the property . . . . and the deficiency (if any) arising by such second sale, together with all charges attending the same, shall be made good by the defaulter." There was no express stipulation that time should be of the essence of the contract. The plaintiff at the time of sale paid a deposit of 30*l.* The defendants were not able to complete the sale on or before the 17th of August, and the plaintiff two days afterwards brought his action to recover the deposit. The defendants were able and willing to complete the sale at the end of November, 1876:—*Held*, that under the conditions time was not of the essence of the contract, and the plaintiff was not entitled to recover. PATRICK *v.* MILNER **342**

**SALVAGE**—Without benefit of, but to pay loss on such part as shall not arrive - **375**
*See* SHIP. 2.

**SCAVENGER** — Duties of — *Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 125 *to* 129—*Refuse of Trade, &c.*] Ashes arising from coals burnt in the furnace of a steam-engine used for the purpose of sawing and lifting timber and other materials for carrying on the business of a pianoforte manufacturer, are "refuse of a trade, business, or manufacture," within the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 128. GAY *v.* CADBY - - - **391**

**SECURITY**—For costs - - - **430**
*See* PRACTICE. 8.

**SERVICE**—Of writ out of the jurisdiction - **24**
*See* PRACTICE. 12.

**SHERIFF**—*Fieri Facias—Poundage—Discharge Fee—Levy Fee*—1 *Vict. c.* 55. *s.* 3.] If a sheriff, who has seized pursuant to a writ of fi. fa. the goods of an execution-debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods.—The goods of the defendants were seized by the sheriff of M. under a writ of fi. fa. issued at the suit of the plaintiff, and afterwards a similar writ in an action by I. against one of the defendants was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment-debts was paid on behalf of the defendants, and no part of the goods seized was sold. The sheriff claimed and received payment of a discharge fee in each action, and in the action at the suit of I., poundage and a levy-fee. A rule was obtained under 1 Vict. c. 55, s. 3, for a return of these fees and the poundage:—*Held*, that the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees and the levy-fee. ROE *v.* HAMMOND - - **300**

**SHIP**—*Amount of Freight—Mortgagee—Cargo—Lien.*] On the first of December, 1874, M., the owner of a ship, then at San Francisco, mortgaged it to the plaintiffs for 7500*l.* and further advances. On the 2nd of December, the captain procured a cargo of wheat "on account of the ship," which cargo was consigned to the order of the shippers under bills of lading stating the freight payable on delivery to be 1*s.* per ton, and the shippers drew bills on M. for the price at sixty days sight, which were attached to the bills of lading, and were accepted by M. The ordinary freight at this time was 55*s.* per ton. In pursuance of previous arrangements, the defendants advanced to

**SHIP**—*continued.*

M., on the 4th of January, 1875, 3000*l.*, and on the 22nd of February a further sum of 9000*l.*, on the security of the cargo, to meet the bills of exchange, it being arranged that they should sell the cargo and receive the proceeds on M.'s account. On the 19th of February the defendants and M. sold the cargo to J. & Co. for 43*s.* 6*d.* a quarter, the contract stating, "as cargo is coming on ship's account freight is to be computed at 55*s.* per ton." The bills of exchange were met by M. with the money advanced by the defendants, and on the 26th of February M. handed to them the bills of lading (indorsed by the shippers), and assigned to them the freight as at 55*s.* per ton. When the ship arrived, the plaintiffs took possession of her, and claimed payment of freight at 55*s.* per ton:—*Held*, that as the property in the goods remained in the shippers, the contract of 1*s.* freight was valid; but that there was no contract for freight at 55*s.*, and that the 55*s.*, though called freight, was, in fact, part of the purchase-money; and, therefore (reversing the judgment of the Common Pleas Division), that the plaintiffs, as mortgagees of the ship, were entitled to 1*s.* freight only, and not to 55*s.* KEITH *v.* BURROWS - C. A. 163

2. ——*Insurance—Profit—Commission—Illegal Policy*—"*Ship* and/or *Ships, Steamer* and/or *Steamers*"—"*Without Benefit of Salvage, but to pay Loss on such Part as shall not arrive*"—19 *Geo.* 2, *c.* 37, *s.* 1.] A policy containing any of the words forbidden by 19 Geo. 2, c. 37, s. 1, is illegal, if the insurance relates simply to "ship and/or ships, steamer and/or steamers," and does not exclude British vessels.—The plaintiffs effected a policy upon commission and profit upon "ship and/or ships, steamer and/or steamers;" and the following clause was inserted: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The defendant was an underwriter of the policy. The goods to which the commission and profit insured related were shipped on board a British vessel, which was lost by the perils of the seas. The plaintiffs having sued to recover the amount of the defendant's subscription, or, if the policy were void, the premium paid by them:—*Held*, that the policy was rendered illegal by 19 Geo. 2, c. 37, s. 1, for the insurance was "without benefit of salvage," and the terms of the policy did not exclude British ships.—Per Grove, J., that the prohibition of the statute extends to policies on profit and commission:—Per Lindley, J., that the prohibition of the statute extends to policies on profit, and that the policy sued on, being illegal as to profit, was likewise illegal as to commission:—*Semble*, per Lindley, J., that the prohibition of the statute extends to policies on commission:—*Held*, further, that the illegality was so far the fault of the plaintiffs that they could not recover back the premium. ALLKINS *v.* JUPE - - - - 375

3. —— *Bill of Lading—Liability of Shipowner*—"*Not accountable for Rust, Leakage, or Breakage.*"] The defendants caused to be shipped on board the plaintiff's vessel bales of palm-baskets and barrels of oil, under a bill of lading containing the clause, "Not accountable for rust, leakage, or breakage." During the voyage some

**SHIP**—*continued.*

of the oil escaped from the barrels, and damaged the palm-baskets:—*Held*, that the clause in the bill of lading, exempting the plaintiff from responsibility for "leakage," did not extend to damage caused by the oil which had escaped from the barrels, and that the plaintiff was liable to compensate the defendants for the injury done to the palm-baskets. THRIFT *v.* YOULE - 432

4. —— *Charterparty—Cesser of Liability—Demurrage—Lien.*] Defendants chartered plaintiffs' ship to carry a cargo of rice to a good and safe port, calling at another port for orders which were to be forwarded within forty-eight hours after notice of her arrival or lay-days to count. Twelve working laying-days to be allowed the freighters for loading the ship at port of loading and waiting for orders at port of call, and fifteen days on demurrage allowed over and above the laying-days, at 4*d.* per ton per day. It was further agreed "that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise." The ship arrived at the port of call with a cargo worth the freight, and notice was given to the defendants.—In an action against the charterers (who had sold the cargo before arrival at the port of call) two breaches of contract were assigned: 1, that the defendants did not give orders as to the ship's port of discharge; 2, that they gave orders for the ship to discharge at a port which was not a good and safe port; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:—*Held*, affirming the judgment of the Common Pleas Division, that the exoneration clause discharged the defendants from liability for the breaches. FRENCH *v.* GERBER - - - - C. A. 247

5. —— *Construction of Charterparty—Liability of Shipowner to Charterers for Negligence of Master and Crew.*] The plaintiffs hired from the defendant a vessel under a charterparty, by which the vessel was let to the plaintiffs for a specified time, and they were to have the whole reach of her holds except what was reserved to the owner for the crew; the crew were to assist in loading and discharging, and the captain was to sign bills of lading and to furnish to the charterers a copy of the log. The defendant engaged and paid the master and crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to the plaintiffs, she and her cargo were lost by the negligence of the master and crew:—*Held*, that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them. THE OMOA COAL AND IRON COMPANY *v.* HUNTLEY - - - - 464

6. —— *General Average—Part of Vessel injured by Perils of the Seas and dangerous to whole Adventure—Voluntary Destruction of useless Part of Adventure—*"*Sacrifice.*"] Whilst on a voyage to H. a vessel met with a storm, which caused parts of the rigging to give way; the mainmast in consequence began to lurch violently, and was cut away by the captain's orders; if the mast had

**SHIP**—*continued.*
not been cut away, it would, in all probability, have fallen overboard in a few minutes, and in so doing might have torn up the decks and caused the vessel to founder; the vessel having outlived the storm, was repaired at a port of refuge, and proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury, whether at the time when the mast was cut away it was virtually a wreck and valueless; but he did not ask them to find whether if the weather had moderated the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere incumbrance:—*Held*, reversing the decision of the Common Pleas Division, a proper direction. Shepherd *v.* Kottgen **C. A. 585**

**SHIPOWNER**—Liability of - - - 432
*See* Ship. 3

—— Liability of, to charterers - - 465
*See* Ship. 5.

**SIGNING**—Judgment - - - 70
*See* Practice. 9.

**SITUATION**—Of property of seconder - 440
*See* Municipal Election.

**SLANDER OF**—Title - - - 24
*See* Practice. 12.

**SOLICITOR** — *Charge for Costs — Property recovered or preserved* — 23 & 24 *Vict.* c. 127, s. 28.] A., as administrator of his deceased mother, sued B. and C. (his brother and sister) in the Common Pleas at Lancaster, in detinue for goods belonging to the estate of the intestate, and recovered a verdict and judgment against them, but was unable to levy. Afterwards B. and C. sued out a plaint in a county court for administration of the estate, and brought into court the proceeds of the goods of the intestate, which they had hitherto concealed:—*Held*, that the solicitor who acted for A. in the action of detinue was entitled to a charge or lien upon the fund in the hands of the registrar of the county court, under 23 & 24 Vict. c. 127, s. 28, as "property recovered or preserved through his instrumentality," in respect of his costs incurred by him, to be taxed as between attorney and client; and that this was the proper Court in which to make the application. Catlow *v.* Catlow 362

**STATEMENT** by debtor of creditor's claim 281
*See* Bankruptcy.

**STATION** - - - - - 125
*See* Railway Company.

**STATUTES**:—8 Hen. 6, c. 7 - - - 26
*See* Parliament.

6 Geo. 4, c. 94 - - - - 224
*See* Factor.

10 Geo. 4. c. 56, s. 27 - - - 410
*See* Building Society.

19 Geo. 2, c. 37, s. 1 - - - 375
*See* Ship. 2.

2 Wm. 4, c. 45, s. 36 - - - 26
*See* Parliament. 1.

2 & 3 Wm. 4, c. 71, s. 3 - - - 13
*See* Prescription.

3 & 4 Wm. 4, c. 15, s. 2 - - - 42
*See* Copyright.

**STATUTES**—*continued.*

6 & 7 Wm. 4, c. 32, s. 4 - - - 410
*See* Building Society.

1 Vict. c. 55, s. 3 - - - - 300
*See* Sheriff.

8 & 9 Vict. c. 18, ss. 9, 22, 68 - - 99
*See* Lands Clauses Act.

10 & 11 Vict. c. 17, ss. 6, 12 - - 99
*See* Lands Clauses Act.

11 & 12 Vict. c. 43, s. 11 - - - 568
*See* Highway.

15 & 16 Vict. c. 54, s. 4 - - - 592
*See* Practice. 3.

16 & 17 Vict. c. 59, s. 19 - - - 151
*See* Cheque.

17 & 18 Vict. c. 361, ss. 1, 7 - - 212
*See* Bill of Sale.

18 & 19 Vict. c. 67, s. 1 - - - 80
*See* Practice.

23 & 24 Vict. c. 127, s. 28 - - 362
*See* Solicitor.

24 & 25 Vict. c. 96, ss. 103, 113 - - 194
*See* False Imprisonment.

24 & 25 Vict. c. 97, s. 41 - - - 351
*See* Malicious Injury to Property.

24 & 25 Vict. c. 133, Sched., Part II., clause 6
*See* Local Government Acts. [255

27 & 28 Vict. c. 101, s. 51 - - - 568
*See* Highway.

27 & 28 Vict. c. 115, s. 2 - - - 351
*See* Malicious Injury to Property.

30 & 31 Vict. c. 131, s. 38 - - 469
*See* Company.

32 & 33 Vict. c. 14, s. 27 - - - 558
*See* Inland Revenue Acts.

32 & 33 Vict. c. 68, s. 2 - - - 265
*See* Marriage, Breach of Promise of.

32 & 33 Vict. c. 71, ss. 28, 81 - - 403
*See* Bankruptcy. 1.

—— —— ss. 31, 126 - - - 314
*See* Bankruptcy. 3.

—— —— ss. 49, 127 - - - 1
*See* Bankruptcy. 4.

—— —— s. 126 - - - - 281
*See* Bankruptcy. 2.

34 & 35 Vict. c. 43, s. 29 - - - 562
*See* Dilapidations.

35 & 36 Vict. c. 76, s. 52 - - - 397
*See* Coal Mines Regulation Act.

35 & 36 Vict. c. 77, ss. 13, 41 - - 547
*See* Metalliferous Mines Act.

35 & 36 Vict. c. 78 - - - 553
*See* Birds Protection Act.

35 & 36 Vict. c. 94, s. 13 - - - 74
*See* Public-house.

38 & 39 Vict. c. 23, s. 11 - - - 558
*See* Inland Revenue Acts.

38 & 39 Vict. c. 40, s. 1, sub-s. 2, 3, and sch. 1, form 2 - - - - 440
*See* Municipal Election.

38 & 39 Vict. c. 55, s. 126, sub-s. 2 - 187
*See* Public Health Act.

39 & 40 Vict. c. 29 - - - 553
*See* Birds Protection Act.

**STEAMER** and or **STEAMERS** - - 37
*See* Ship. 2.

**STREAM OF WATER, PURCHASE OF** - 99
*See* Lands Clauses Act.

**TAXATION**—Of costs - - - - 273
*See* Practice. 10.

**TELEGRAPH COMPANY**—*Liability for Damages resulting from Misdelivery of a Telegram.*] No action will lie against a telegraph company at the suit of the *receiver* for the misdelivery of a telegram, unless there be either a contract between him and the company, or (possibly) fraud on their part in the transmission of it.—The plaintiffs were merchants at Valparaiso, being a branch house of a firm carrying on business under a different style at Liverpool. The defendants, a telegraph company, with its chief office in London, had agencies at Liverpool and elsewhere, including Monte Video, but not at Valparaiso. The defendants had a system of forwarding the messages of several senders in one "packed telegram," each message being distinguished by a cipher known to the defendants and their agents and to the senders, which messages on the receipt of the packed telegrams by the defendants' agents were transmitted to their proper recipients. In December, 1874, the plaintiffs, at Valparaiso, received a message transmitted by the defendants from Monte Video, purporting to be an order, which the plaintiffs executed, from the plaintiffs' Liverpool house for a large quantity of barley. No such message was in fact sent by the Liverpool firm nor was the message intended for the plaintiffs. The misdelivery of the message was caused by the negligence of an agent of the defendants, and resulted in serious loss to the plaintiffs, in consequence of the fall in the market:—*Held*, on demurrer, that, there being no contract between the plaintiffs and the defendants, and no duty owing by the latter to the former, there was no cause of action. Dickson *v.* Reuter's Telegraph Company - - - - 62

**TENANT FOR LIFE** - - - - 99
*See* Lands Clauses Act.

**TERMINATION** of service - - - 397
*See* Coal Mines Regulation Act.

**TICKET** - - - - - - 416
*See* Railway Company.

**TIME** - - - - - - - 21
*See* Practice. 1.

—— Giving - - - - - - 46
*See* Principal and Surety.

**TRUSTEES**—Action against, to recover subscription - - - - - - 410
*See* Building Society.

**ULTRÀ VIRES** - - - - 99
*See* Lands Clauses Act.

**VOTE**—County - - - - 38
*See* Parliament.

**WAGER**—*Agreement by Way of*—8 & 9 *Vict. c.* 109, *s.* 18.] The plaintiff was a "tipster," i.e., gave information as to the probable winners of horse races. Upon his giving the name of a horse to the defendant as the probable winner of a certain race, it was agreed between them that the plaintiff should have 2*l.* on the horse at 25 to 1, that is to say, that, if the defendant backed the horse and won, the plaintiff should have 50*l.* out of his winnings, but if the horse lost, the plaintiff should pay the defendant 2*l.*—The defendant did back the horse, and it won, and the plaintiff thereupon claimed 50*l.* out of the defendant's winnings:—*Held*, that the agreement was void within 8 & 9 Vict. c. 109, s. 18, and that the 50*l.* could not be recovered.—*Beeston* v. *Beeston* (1 Ex. D. 13) distinguished. Higginson *v.* Simpson 76

**WATER**, purchase of right in - - 99
*See* Lands Clauses Act.

**WATERWORKS CLAUSES ACT, 1847** - 99
*See* Lands Clauses Act.

**WITHDRAWAL**—Notice of, effect of - 410
*See* Building Society.

**WORDS**:—"Chattels, personal" - - 212
*See* Bill of Sale.

—— "Debts provable under bankruptcy" 403
*See* Bankruptcy. 1.

—— "Debts proved and admitted in bankruptcy" [403
*See* Bankruptcy. 1.

—— "Employed in or about works" - 397
*See* Coal Mines Regulation Act.

—— "Event follow the" - - - 119
*See* Practice. 7.

—— "Found committing" - - - 194
*See* False Imprisonment.

—— "Free land or tenement to the value of 40*s.*" [38
*See* Parliament.

—— "Immediately apprehended" - - 194
*See* False Imprisonment.

—— "In charge of" - - - - 187
*See* Public Health Act.

—— "Injury to any such lands" - - 99
*See* Lands Clauses Act.

—— "Not accountable for rust, leakage, or breakage" - - - - - 432
*See* Ship. 3.

—— "Permits drunkenness" - - 74
*See* Public House.

—— "Property recovered or preserved" - 362
*See* Solicitor.

—— "Ship $\frac{\text{and}}{\text{or}}$ ships" - - - 375
*See* Ship. 2.

—— "Special circumstances" - - 430
*See* Practice. 6.

—— "Without benefit of salvage, but to pay loss on such part as shall not arrive" 375
*See* Ship. 2.

—— "Without proper precaution" - 187
*See* Public Health Act.

**WORKMEN**—Employed in mine with power to dismiss themselves at a moment's notice
*See* Coal Mines Regulation Act. [397

END OF VOL. II.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

NV - 6 OCT 1959